THE OPERATION OF THE EMPLOYMENT TRIBUNAL

An investigation of the personal grievance adjudication procedure under the *Employment Contracts Act 1991*

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PREFACE

When the National Government passed the *Employment Contracts Act 1991*, I was a solicitor working for the Ministry of Women's Affairs in Wellington. As part of my work, I had to consider the effects of the new legislation on women and to some extent on other equal employment opportunity targets groups such as Maori, Pacific Island people, and people with disabilities. I felt some responsibility for bits of the *Employment Contracts Act 1991* for at the time of its development, I was a solicitor in the Legal Section of the State Services Commission with responsibility for a small part of the Employment Contracts Bill; the part on personal grievances. As a person who had previously been active in a trade union and subsequently worked for one, I still had strong connections in that field. My partner also worked as an industrial officer for a State Sector union; I was therefore very familiar with the sort of rhetoric which surrounded the legislation and naturally had an interest in the development of the law.

Upon shifting to Christchurch in 1994, I was employed by the Human Rights Commission for approximately two years as a mediator. After a time, I decided that I would like to undertake some postgraduate study in employment law and human rights. On completion of a Master of Laws, my supervisor suggested I might like to consider undertaking a PhD.

At the time I was astounded. I had been involved in a serious road accident and did not have a great deal of confidence in my abilities. However, I decided in August 1998 to give the PhD a go. Naturally, I gravitated toward the effects of the *Employment Contracts Act 1991* and its operation over the time since its inception. While the focus

was subsequently narrowed, it took a huge amount of time to study for the topic of the operation of the Employment Tribunal and then to focus in on the detail of how the provisions relating to the Employment Tribunal affected users of the personal grievance adjudication system.

I decided I did not want my PhD to be strictly law based. I wanted to consult the users of the system to determine their views, and to interview Employment Tribunal adjudicators to find out their perspective.

At the time of undertaking this thesis, I was also doing voluntary work on various boards of directors and Government appointed advisory boards, which took up a considerable amount of my time. I also had some difficulties with a detached retina and other health problems which resulted in some absence from the university. However, I had excellent research assistants, who have really helped with finding relevant material, proof reading, keeping me and my two guide dogs in order and also giving me lots of cheek, good humour, and moral support for this 'spiritual journey'[1]. Without their assistance, it would have been impossible for me to succeed, so I thank them very warmly. To Rachel Cray, Triona Ducey, Magda van Rouyen, Tim Turnball, Helen McAra, Louise Petrie, John Grant, Tharron McIvor, Katie Ellena, Lisa Yarwood, Kylie Scott, Regina Posorski, David Goldwater, Tamsin Laird and last but not least, Emily Hewitt for her excellent good humour and editing skills: you have my hearty thanks.

[1] Co-supervisor, Dr Ramzi Addison, Department of Commerce, Lincoln University.

I would also like to say a huge thank you to my co-supervisors, John Hughes from the University of Canterbury and Dr Ramzi Addison from Lincoln University. They have both been absolutely terrific. John, I think, is a walking employment law encyclopaedia; he is simply amazing. Ramzi too is terrific; his supervision focussed more on the survey and interviewing analysis in this thesis. He is the one with expertise on statistics and that type of thing. On Dr Addison's resignation, Dr Alison Loveridge from Sociology agreed to assist with the Social Science side of things. I warmly thank her for her endless patience in working with a non Social Science student and giving me a crash-course in statistical analysis. Thanks are also extended to Professor Steve Weaver, Dean of Postgraduate Studies, for his much-appreciated understanding and support in assisting me to complete the research.

I would also like to say a warm thank you to employees at the Department of Labour and to staff at the Employment Tribunal itself. All have been very supportive and encouraging in assisting with this research and their help is greatly appreciated.

I'd also like to thank my partner, David Beck, who has put up with my complaints over the years when I felt really fed up with the whole thesis business. His support has helped me carry on until the end along with the unending support I have received from both my supervisors and the research workers who have assisted me.

Linda M Beck

ABSTRACT

The passage of the *Employment Contracts Act* by the National government in 1991 caused considerable controversy amongst trade unions in New Zealand and legal practitioners. I decided to examine whether the government had met its stated intentions to create a straight-forward, cheap, and accessible system for resolving personal grievances. Therefore the main questions to be asked related to what people's experiences were using adjudication under the Act, and whether the system adequately resolved personal grievance issues. In particular, I focused on the experiences of participants using the personal grievance adjudication procedure. The question of whether the process actually worked for participants could be measured by examining available access to the system in terms of cost and accessibility of representation. Another factor to be considered related to whether ultimate conclusions reached by the employment tribunal adequately addressed the issues raised. For example – did grievance receive adequate compensation? What were the costs involved to the parties and did the grievant have suitable employment? This research investigated whether the personal grievance adjudication system work in the manner intended by the government of the day for those participants.

Interviews with employment tribunal adjudicators were a crucial art of determining whether or not the adjudication process worked successfully. Adjudicators were very open and willing to participate, and a considerable amount of unexpected, useful information was forthcoming. Surveys of participants in 150 personal grievances which occurred in 1997 supported the information provided by adjudicators. Data obtained from researching all personal grievance and cost decisions in 1997 provided

quantitative support to the comments made by adjudicators, and those received by survey participants.

The wide range of research methodologies used in conducting this thesis gives some credence to the conclusions reached as the range of processes used covered many different aspects of the adjudication system and how it affected participants in an unprecedented manor. The research conducted by Ian McAndrew in Otago covered the entire period during which the *Employment Contracts Act 1991* was enforced. However, the questions asked in this thesis have tended to be more specific.

In summary, my research has suggested that whether or not the *Employment Contracts Act 1991* adjudication system worked largely depended on circumstances of each individual participant. Members of the legal profession felt most at home using adjudication, whilst many applicants and some respondents felt varying degrees of trepidation. Likewise, the views of adjudicators regarding the success of the system often depended on their background and experience.

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CHAPTER 1

Chapter 1

A STUDY OF PERSONAL GRIEVANCES

1.1 INTRODUCTION

Upon assuming office in 1990 the National Government swiftly enacted the *Employment Contracts Act 1991* taking effect from 19 August of that year. The Act came into force following much debate between employer and employee groups. Central to the personal grievance resolution mechanism in the Act was the formation of the Employment Tribunal, replacing previous tripartite conciliation services. The newly formed Employment Tribunal was described as a 'low level, informal, specialist' institution which would provide '…speedy, fair and just resolutions of differences between parties to employment contracts'.[1] However, the objects of the Act, with emphasis on strict contractual principles, were subject to a polarised debate between unions and employer groups. The Act was welcomed by employers but unions vigorously opposed its introduction and its failure to recognise them. During the life of the *Employment Contracts Act 1991*, this controversy continued unabated.[2]

Rhetoric aside, this thesis examines the actual experiences of users of the personal grievance adjudication process and their perception of the Employment Tribunal's

[1] *Employment Contracts Act 1991*, s 76(c).

[2] Since the completion of research for this thesis, the *Employment Contracts Act 1991* was repealed by the *Employment Relations Act 2000*, and a new system for resolving personal grievances was put into place. However, this innovation had no impact on my thesis findings. Significantly, some of the improvements suggested by adjudicators and participants within this thesis were incorporated into the resolution process for personal grievances contained in the *Employment Relations Act 2000*, as discussed in Chapter Eight.

efficacy and ability to address employment issues as they arose (for example, did users have access to a fair, inexpensive, and straightforward process to resolve their personal grievances?) Looking at these factors illustrates whether users found access to justice in the Employment Tribunal system. By identifying the effective features and negative aspects of the process, this thesis will determine whether the procedure benefits not only policy makers, but all participants in the personal grievance adjudication system. In this context, the thesis addresses two basic questions:

- What were the experiences of participants using the personal grievance adjudication procedure?
- Did the personal grievance adjudication system work in the manner intended by the government of the day for those participants?

1.2 INITIAL PROPOSAL FOR STUDY

The reason for conducting this research was largely due to an interest in the historical development of the personal grievance framework and how legislative changes impacted on those using the system. As the intention of the National Government had been to extend access of the personal grievance procedure to all employees, it was important to investigate the impact of this policy. For instance, did all employees enjoy equal access or were there limitations on its availability? It was not intended that this thesis be an extensive study of the interpretation and application of the law which has been addressed elsewhere.[3] However, it is acknowledged that the personal grievance adjudication process took place within a formal legal framework. It was therefore intended that readers of this thesis need not be familiar with the application

[3] See Chapter 2.2 Historical Background for information on the development of personal grievance law, for example: K Hince (n 1); G L Anderson (n 21); N S Woods (n 11); D L Mathieson (n 18).

of personal grievance law, but the thesis should explain the legal framework within which adjudication took place.

The initial proposal was therefore to study the establishment of the Employment Tribunal in a historical context and determine the effects of the institutional and procedural changes under the *Employment Contracts Act 1991*. This raised numerous issues relating to the use of the Employment Tribunal, such as potential constraints on accessing the personal grievance process, the nature of representation (and associated costs) the adjudication procedure itself, and delays with adjudication hearings including delays with adjudicators providing decisions and parties receiving them. One measure of assessing the adjudication process was to evaluate the effectiveness of outcomes provided by the Employment Tribunal in light of these issues, providing some insight into whether access to justice was achieved.

To explore these issues, it was decided to study all personal grievance decisions that took place in 1997 in the Employment Tribunal. By that time, the changes that occurred under the *Employment Contracts Act 1991* were well established and therefore it reflected a representative year in the working life of the Employment Tribunal. The first stage of the proposed research involved entering relevant information from 1997 cases into a specially created database.

Stage two of the proposed research involved a representative selection of participants from 150 of the above personal grievance decisions and surveying them on their practical experiences, the costs involved and outcomes of using the Employment Tribunal. It was also important to consider any benefits achieved and rewards gained

from using adjudication. These benefits could have related to, for example, either financial gain or retaining employment, and associated positive outcomes.

Stage three proposed to conduct an in-depth study from twenty cases from stage two and carry out surveys of 150 participants in personal grievance cases. This initial proposal comprised an analysis of Employment Tribunal decisions, interviews with adjudicators and surveys of participants to determine the answers to the research questions. It was decided that it would be practical to confine the study to interviewing all available Employment Tribunal members who were adjudicating in 1997. It was hoped that these interviews would highlight the different approaches taken by adjudicators and the methods which they used to resolve different types of personal grievances. In the event, it became clear that an in-depth case study of the detailed experiences of participants in twenty personal grievance adjudication cases would not have been cost-effective or practicable due to time constraints and access to resources.

1.3 THESIS OVERVIEW

Including this introduction, the thesis is divided into eight chapters. Chapter Two describes the historical development of the resolution of personal grievances in New Zealand. Tracking the origin of legislative intervention since the *Industrial Conciliation and Arbitration Act 1894*, Chapter Two involves a brief study of the development of sophisticated employment related dispute mechanisms, which finally crystallised as the personal grievance provisions in the *Industrial Relations Act 1973*. Beyond this, developments introduced by the *Labour Relations Act 1987* and the *State Sector Act 1988* are examined as precursors to the passage of the *Employment*

Contracts Act 1991. The Chapter examines the political context of the passing of the *Employment Contracts Act 1991* and then details the Act's institutional structures, categories of personal grievances, procedure (including alternatives and common law actions), remedies, and the operation of the Employment Tribunal set against a background of relevant case law and commentary.[4] Chapter Two illustrates how the legislation developed when attempting to resolve personal grievance-type issues and whether at each stage of its development the questions at issue had been resolved. Chapter Two finally examines whether the development of the legislative framework assisted with the resolution of the questions raised in this thesis.

Chapter Three explores the realities of access to justice issues raised by the *Employment Contracts Act 1991*. Access to justice is assessed in the context of the Act's expressed aims in Section 76 to provide a low level, informal, specialist tribunal.

Chapter Four generally describes how and why information for this thesis was collected and recorded. The chapter describes methodology used to collect and analyse data for this research, why this methodology was chosen and briefly compares methods used by others who researched in this area. This required an informal 'crash course' in qualitative and quantitative research methods to ensure the data collected was informative and relevant to the thesis questions. This information gathering and analysis was divided into three stages:

[4] Commentary on case law in relation to *Employment Contracts Act 1991*, s 76, which relates to the objects of the Employment Tribunal, is discussed more fully in Chapter Two.

- Firstly, the creation of a database of all 1997 Employment Tribunal personal grievance and related costs decisions. 1997 was selected as a representative year in the operation of the Employment Tribunal; by this stage any unresolved personal grievances left from the operation of the *Labour Relations Act 1987* had been settled, and processes under the *Employment Contracts Act 1991* had been firmly established.

- The second stage describes how interviews with Employment Tribunal adjudicators were arranged and conducted. It discusses how the questions were devised, how the interviews proceeded, how the data was analysed, and how this related to the research questions.

- Finally, Chapter Four examines how survey participants were selected, contacted and details the methodology used to survey the participants in 150 personal grievance cases from 1997. It also discusses how the survey questions were constructed in order to obtain relevant answers, what specific questions were asked and how the results were collated and related to the research topic.

Chapters Five, Six and Seven discuss the processes used to determine answers to the first two thesis questions, outlining the research findings. Chapter Five examines the objective data collected from all 1997 Employment Tribunal personal grievance decisions; Chapter Six considers detailed interviews with Employment Tribunal adjudicators; and Chapter Seven records the results from the survey of participants and their representatives from 150 personal grievance decisions in 1997.

By using illustrative tables, Chapter Five details information gained from all 1997 Employment Tribunal personal grievance and related costs decisions. The analysis includes information on gender, occupational background, choice of representation, causes of action, delay, outcomes, remedies sought and granted, contributory fault, impact of adjudicators' discretion and legal costs; thus profiling participants and their experiences of using adjudication. Chapter Five also identifies potential areas of difficulty for those using the personal grievance procedure. This information is compared with the findings of other related research and explores any differences and similarities found. This investigation provides a comprehensive examination of the differing factors affecting the nature of personal grievances in the Employment Tribunal, and how such factors can be used as indicators of success. For example, I consider the cost of taking the case (legal costs and lodging fees), potential lost wages, and delay in receiving any compensation. The information obtained through case analysis has provided an objective indicator of whether or not applicants would have believed that their personal grievance had been successfully resolved. This information was compared with the subjective data obtained through surveys that is considered in Chapter Seven. The overall success of the adjudication system is further analysed in Chapter Eight when determining whether there was access to justice and whether the adjudication system for personal grievances actually worked.

In assisting to determine this question, Chapter Six records interviews with Employment Tribunal adjudicators and provided a unique opportunity to examine the views of the decision-makers. The interviews were extensive, averaging ninety minutes each, and adjudicators provided rich responses and feedback to the topics addressed. To my knowledge, the views of adjudicators have never been sought to

this extent before. The chapter explores the views of those who had influence on whether the adjudication process itself was effective in the manner intended in resolving personal grievances under the *Employment Contracts Act 1991*. The chapter is divided into the five categories of questions that were asked of adjudicators:

- *Process*: It was important to determine adjudicators' opinions of the adjudication procedure itself. This section compares adjudicators' views with the government and statutory intentions and explores procedural requirements that may have resulted in the process becoming overly complex and legalistic.

- *Types of Personal Grievance*: This section looks at the approach taken by adjudicators when hearing different types of personal grievances. For example, was a more sensitive approach used in sexual harassment or discrimination cases?

- *Parties*: Similarly to above, the third category examines whether certain characteristics of parties, such as gender, occupation, ethnicity, and disability, have any impact on adjudicators' attitudes and their decision making process. It also considers potential power imbalances between parties and other inequalities and adjudicators' responses to them.

- *Representation*: This section discusses issues of representation from the perspective of adjudicators. For example, did the type of representative and the standard of representation provided have any affect on the attitude of adjudicators and potentially the outcome of the case? Differing levels of training and experience may also have been influential on the final outcome of the adjudication process.

- *Costs*: The final section in Chapter Six explores adjudicators' opinions on costs, what factors they took into account when awarding them and the impact of Legal Aid. This was important in determining whether adjudication was accessible to the parties involved, and thus if the personal grievance adjudication system worked in the manner intended by the government of the day.

Chapter Seven, the final stage in examining the research findings, investigates the surveys of participants of 150 personal grievance cases heard in the Employment Tribunal in 1997. Participants included in this survey were employees, employers, and their representatives from each case. Chapter Seven therefore explores the issues raised from the perspective of all parties involved (except for adjudicators) and identifies relevant issues facing participants in the personal grievance procedure. The survey results illustrate what parties and their representatives thought of the personal grievance process (including views on why their mediation was unsuccessful); the impact of the choice of representation, and then contrasts participant views with the stated legislative objectives. This chapter addresses the specific personal experiences of participants using the personal grievance procedure, and whether they believed adjudication worked for them.

Finally, the main focus of Chapter Eight, the last chapter, is to draw the thesis together, determining whether the adjudication system worked in the manner intended. Drawing from the issues raised in Chapter Three, this chapter examines the principle of access to justice, determining whether it has been achieved by comparing the findings of this thesis with the declared objects of institutional process under

Section 76, *Employment Contracts Act 1991*. The case law interpreting these objects is also considered with the impact of delay, legal cost and choice of representation.

Chapter Eight also summarises the findings of Chapters Five to Seven and places these in the context of the *Employment Relations Act 2000*, identifying any outstanding issues and how they might be resolved. By identifying the effective features and negative aspects of the process, this thesis determines what the experiences were of participants using the personal grievance adjudication procedure, if the personal grievance adjudication system worked in the manner intended by the government of the day and whether the procedure has benefited not only policy makers, but all participants in the personal grievance adjudication system.

CHAPTER 2

Chapter 2

PERSONAL GRIEVANCES – BACKGROUND

2.1 INTRODUCTION

This chapter briefly outlines the historical and political evolution of the personal grievance procedure in New Zealand and focusses upon the differing definitions of personal grievances under changing statutory authority. The chapter also examines relevant institutional structures, the statutory personal grievance procedure itself, and briefly considers alternative grievance procedures. In addition, a contrast is drawn between the procedure available to pursue a personal grievance in the Employment Tribunal and the complaints procedure contained in the *Human Rights Act 1993*.

2.2 HISTORICAL BACKGROUND

During the 1890s New Zealand was viewed as a country of social experimentation.[1] Against a backdrop of industrial disruption by Australian workers in key export orientated industries, the New Zealand Government enacted major structural industrial legislation to prevent similar disruption and guarantee access to emerging export

[1] K Hince, 'From William Pember Reeves to William Francis Birch: From Conciliation to Contracts', 7–12 in R Harbridge (ed), *Employment Contracts: New Zealand Experiences* (1993).

markets.[2] In 1891, a Department of Labour was established to administer social and industrial reforms including programmes to assist the unemployed, minimum conditions of employment in factories and shops, control of domestic trading activities and the protection of women and minors in the labour market.[3]

A key component of reform was the passage of the *Industrial Conciliation and Arbitration Act 1894*, which established a process of conciliation and arbitration of industrial disputes.[4] The Act required unions to register and the principle of collective activity, including collective bargaining, was regulated.[5] Union registration provided access to state controlled conciliation, arbitration and bargaining mechanisms.[6] Registration also guaranteed workers access to minimum wages and conditions of employment specified in awards and industrial agreements.[7] State enforcement of awards and industrial agreements were significant features of the legislation.[8] The Act provided that each award would state the industrial union, trade union, association, person or

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[2] Ibid.
[3] The Labour Department was formally established by *The Labour Department Act 1908*. See also J E Martin, *Holding the Balance* (1996) and A E C Hare, *Industrial Relations in New Zealand* (1946) 276.
[4] *Industrial Conciliation and Arbitration Act 1894*, ss 42 and 46. See J Holt, *Compulsory Arbitration in New Zealand* (1986) and N S Woods, *Industrial Conciliation and Arbitration in New Zealand* (1963) for a detailed history on the origins and history of the New Zealand Arbitration system.
[5] *Industrial Conciliation and Arbitration Act 1894*, s 17 which allowed industrial unions and associations to be a party to an industrial agreement. The general provisions regarding registration of associations and unions contained in the Act legitimised the existence of unions and associations and their ability to negotiate awards and agreements; refer *Industrial Conciliation and Arbitration Act 1894*, ss 3–16.
[6] *Industrial Conciliation and Arbitration Act 1894*, ss 42 and 53.
[7] Ibid, s 74 stated that every award must contain definitions of the parties on whom it was to be binding and the duration of the award, which could not exceed two years. Section 17 of the same Act defined who parties to an agreement could be and s 21 stated the effect of the agreement.
[8] Ibid, ss 74–81 provided for the enforcement procedures relevant to awards. Section 23 of the same Act stated that the provisions enforcing awards also applied to industrial agreements.

persons bound by the award.[9] Section 17 of the Act indicated that the parties to industrial agreements could be trade unions, industrial unions, industrial associations or employers and that any such agreement could provide for 'any matter or thing affecting any industrial matter or any thing affecting any industrial matter or dispute.'[10]

Awards and agreements were distinguished by coverage differences. Awards contained 'blanket coverage' and 'subsequent parties' clauses that extended the terms and conditions across industries or occupations. Consequently, the award bound workers and employers who had not been directly involved in negotiation. In contrast, an agreement covered only the negotiating parties and relevant employees.[11]

The 1894 Act established specialist employment institutions[12] to resolve disputes over awards and industrial agreements.[13] A specialist Court of Arbitration was established with limited jurisdiction over workers covered by an award or agreement.[14] The legislation provided for the types of issues that the Court of Arbitration could determine. Dismissal or unfair treatment cases were excluded from the functions that the court was

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[9] Ibid, s 74.
[10] Ibid, s 17.
[11] N S Woods, *Industrial Conciliation and Arbitration in New Zealand* (1963) 69.
[12] *Industrial Conciliation and Arbitration Act 1894*, s 30 established Boards of Conciliation. Section 32(1) provided that every Board was to consist of between four and six members elected by the industrial unions of employers and workers in the industrial districts. The Chairman was elected separately. Section 43 gave the power to Boards to 'carefully and expeditiously' inquire into and investigate industrial disputes. Section 44 of this Act stated that Boards of Conciliation were empowered to make any suggestions, which appeared to them to be right and proper in order to resolve and settle any industrial dispute in a fair and amicable manner. Alternatively, they could decide the issue based on the merits and substantive justice of the case.
[13] Ibid, ss 44 and 52.
[14] Ibid, s 52.

authorised to determine. These were matters that remained within the jurisdiction of the common law and the ordinary courts regardless of award or agreement coverage.[15] The Court of Arbitration had authority to make decisions on the grounds of 'equity and good conscience'[16] with appeals from decisions restricted to points of law. The Court structure was tripartite, consisting of a judge and lay members appointed after consultation with the central bodies of unions of workers and employers.[17]

The *Industrial Conciliation and Arbitration Act 1894* survived largely intact with periodic fine-tuning and amendments up until 1954[18] when a consolidated *Industrial Conciliation and Arbitration Act* was enacted.[19] This legislation updated the conciliation and arbitration process applicable in New Zealand.

However, until 1973 the only action available to a dismissed worker remained a restricted common law claim for wrongful dismissal. Lawful grounds for wrongful dismissal were principally dismissal on notice for misconduct, wilful disobedience and neglect.[20] Anderson suggested that at this stage, industrial law had not yet developed protective mechanisms, which would take into account the reality of the working environment for

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[15] Ibid, ss 45, 46 and 52.
[16] Ibid, s 61.
[17] Ibid, s 48(1).
[18] D L Mathieson, *Industrial Law in New Zealand* (1970) 2.
[19] The long title to the Act was, 'An Act to consolidate and amend the Law Relating to the Settlement of Industrial Disputes by Conciliation and Arbitration'.
[20] D L Mathieson, *Industrial Law in New Zealand* (1970), ch IV; A Szakats, *Introduction to the Law of Employment* (1975), ch 18.

most workers.[21] Anderson drew a comparison between a 1963 ILO Convention aimed at the provision of relatively secure employment[22] and the applicable common law, which permitted the employer to dismiss at will, subject only to the observance of proper notice.[23] Green suggested, during this period, that employers firmly believed in the exercise of managerial prerogative and that the right to hire and fire should not be subject to legislative or procedural constraint.[24] Green also observed a strong belief that the number of workers required by an effective business was an exclusive employer prerogative. In the 1960s, Green suggested that if a worker lost their employment, it would be easy for them to find alternative work, although they would lose some service-related benefits, for example employer-subsidised superannuation.[25]

By contrast, in the state sector the *State Services Act 1962* legislated for disciplinary and dismissal matters.[26] This provided state servants with exclusive access to statutory dispute resolution tribunals.

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[21] G J Anderson, *Procedures to Settle Personal Grievances: An Examination of Section 117 of the Industrial Relations Act 1973* (1978).

[22] ILO Recommendation 119 Concerning the Termination of Employment at the Initiative of the Employer (1963). Clause 2(1) of the recommendation provides: Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.
Although New Zealand is a member of the International Labour Organisation, New Zealand did not ratify this recommendation.

[23] G J Anderson, *Procedures to Settle Personal Grievances: An Examination of Section 117 of the Industrial Relations Act 1973* (1978) 2.

[24] R L Green, *Procedures to Settle Disputes Over Alleged Wrongful Dismissal* (1966) 1.

[25] Ibid.

[26] *State Services Act 1962*, ss 40, 55–58. These sections governed offences and penalties, which could be imposed on public servants who committed offences within the provisions of the Act. Also see J Hughes, *Labour Law in New Zealand* (1990) 1814. The 1962 Act was repealed by the *State Sector Act 1988*, which

Compulsory conciliation and arbitration resulted in a relatively stable private sector employment environment, with little legislative amendment until the 1970s. The exception during this period was a tendency for workers to directly challenge a dismissal by utilising industrial action as 'leverage'.[27] This led to the passage of the *Industrial Conciliation and Arbitration Amendment Act 1970*. This legislation enabled workers to pursue a personal grievance against their employer on the grounds of wrongful dismissal or in respect of any action by the employer which affected the worker's employment to his or her disadvantage.[28] If no agreement was reached between the parties, the Chairman of a Disputes Committee[29] was given an indirect authority to make a decision.[30] Standard personal grievance procedures were outlined in s 4 of the *Industrial Conciliation and Arbitration Amendment Act 1970* and deemed to be included in all awards and agreements to enable settlement of personal grievance and interpretation disputes.[31] The provisions included a requirement that the worker make an initial, direct approach to the employer. If not resolved, the union was notified and was required to take up the matter

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unified application of the relevant law, so that for the first time personal grievance procedure applied to state sector employees.

[27] Faulkner (1970) 369 NZPD 3606.

[28] *Industrial Conciliation and Arbitration Amendment Act 1970*, s 4 inserting a new s 179 in Industrial Conciliation and Arbitration Act 1954. See D L Mathieson, *Industrial Law in New Zealand* (1970), 49–53 for a detailed discussion of wrongful dismissal.

[29] Ibid, s 3 inserting a new s 178(3) in *Industrial Conciliation and Arbitration Act 1954*, defined a Disputes Committee as an equal number of representatives appointed by the union and employer, and a mutually agreed Chairman. Under subsection (4) the Committee reached its decisions by majority. If no agreement could be reached, the Chairman made a decision or referred the case to the Court for determination.

[30] Ibid, s 4 inserting new ss 178 and 179 in *Industrial Conciliation and Arbitration Act 1954*. See G J Anderson, *Procedures to Settle Personal Grievances; An Examination of Section 117 of the Industrial Relations Act, 1973* (1978) 6 who notes it is unclear what authority the chair actually had, as although there was intent to give the chair the decision making capacity, express authority was absent.

[31] Ibid, s 4 inserting a new s 179(3) in *Industrial Conciliation and Arbitration Act 1954*.

with the employer on the worker's behalf. If this process was unsuccessful, the matter was then referred to either a Disputes Committee or an independent arbitrator. Whether the Disputes Committee or an arbitrator heard the personal grievance was determined by the relevant industrial instrument.[32] If no arbitrator was specified in the instrument or agreed upon by the parties, the Minister of Labour appointed an arbitrator. Personal grievance remedies were reimbursement of lost wages, reinstatement and compensation.[33] The decision of either the Disputes Committee or arbitrator was binding on the parties.[34] If the complaint against the employer did not meet the basic legal requirements of a personal grievance, that is, if the action complained of was not a dismissal or if the action complained of did not result in disadvantage to the employee, or if the complainant did not have access to the personal grievance procedure, it was possible for the employee to pursue a common law claim for breach of contract in the ordinary courts.

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[32] Defined as any award or industrial agreement under the *Labour Disputes Investigation Act 1913*, s 8 and any other agreement in the nature of an industrial agreement made between a workers' union and an employer or a body of employers. *Industrial Conciliation and Arbitration Amendment Act 1970*, s 3.
[33] *Industrial Conciliation and Arbitration Amendment Act 1970*, s 4 inserting a new s 179(5) in *Industrial Conciliation and Arbitration Act 1954*.
[34] Ibid, s 4 inserting a new s 179 in *Industrial Conciliation and Arbitration Act 1954*.

A Mediation Service was established in 1970. The Government viewed mediation as a method of avoiding workplace industrial action over personal grievances,[35] and as a general dispute-prevention mechanism.[36]

2.2.1 *INDUSTRIAL RELATIONS ACT 1973*

In 1972, the Minister of Labour introduced an Industrial Relations Bill, describing it as 'the most complete recasting of our industrial legislation since the *Industrial Conciliation and Arbitration Act* was first enacted in 1894'.[37] This led to the passage of the *Industrial Relations Act 1973*, replacing the concept of 'wrongful dismissal' with a statutory right to take a personal grievance for 'unjustifiable' dismissal.[38] A personal grievance could still be taken on the grounds of any other action by the employer that 'disadvantaged' a worker.[39]

Personal grievances were defined in s 117 of the *Industrial Relations Act 1973* as:

> Any grievance that a worker may have against his employer because of a claim that he has been unjustifiably dismissed, or that other action by the employer (not being an action of a kind

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[35] R Ryan and P Walsh, 'Common Law v Labour Law: The New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 232.

[36] The Mediation Service's functions were found in *Industrial Conciliation and Arbitration Amendment Act 1970*, s 5 inserting a new s 180(3)(4) in *Industrial Conciliation and Arbitration Act 1954*. Functions were: to assist with maintenance of harmonious industrial relations; to use best endeavours to prevent industrial disputes; to assist with the prevention of an industrial dispute when the mediator or either of the parties became aware of that possibility; when dispute arose, to offer their services to the parties to assist with settlement; to inquire fully into the dispute and to make suggestions and recommendations to assist with its settlement; if the parties agree, to decide such matters which are referred to the mediator for decision; and to exercise any other function conferred by this or any other Act.

[37] 381 NZPD 3476.

[38] See s 117 of the *Industrial Relations Act 1973*, which defined personal grievances and established a procedure for their resolution.

[39] *Industrial Relations Act 1973*, s 117.

> applicable generally to workers of the same class employed by the employer) affects his employment to his disadvantage.

Anderson suggested the reason for the change to 'unjustifiable dismissal' was to prevent a narrow interpretation of the previous term 'wrongful dismissal', which had the potential for confusion with its common law counterpart.[40] Wrongful dismissal at common law was a narrow concept entailing dismissal without contractual notice or if no notice was stipulated in the contract, dismissal without reasonable notice,[41] unless grounds existed for summary dismissal for cause.[42] The remedy for wrongful dismissal was restricted to payment for the notice period.[43] The change to a concept of 'unjustifiable dismissal' was prompted by the legislature's desire for a broader, fairer approach to unlawful dismissals.[44]

Section 117 of the *Industrial Relations Act 1973* restricted access to the personal grievance procedure to workers covered by awards and collective agreements.[45] The 1973 Act also established a procedure for processing personal grievances. This entailed a Grievance Committee consisting of an equal number of representatives from both

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[40] G J Anderson, *Procedures to Settle Personal Grievances: An Examination of Section 117 of the Industrial Relations Act 1973* (1978) 7.
[41] *Baker v Denkara Ashanti Mining Corporation Ltd* (1903) 20 TLR 37; *Hartley v Harman* (1840) 11 A and E 798.
[42] See D L Mathieson, *Industrial Law in New Zealand* (1970) 49–53 for a detailed discussion on wrongful dismissals.
[43] *Baker v Denkara Ashanti Mining Corporation Ltd* (1903) 20 TLR 37.
[44] G J Anderson, *Procedures to Settle Personal Grievances: An Examination of Section 117 Industrial Relations Act, 1973* (1978) 7.
[45] See s 117(2) and (4) of the *Industrial Relations Act 1973* which required workers covered by awards and collective agreements to notify the employer of a personal grievance, and for the worker to notify the relevant union which had to take up the matter as soon as practicable. This subsection contained detailed procedures on steps which workers and employers were required to follow in personal grievance situations.

employers and unions. The disputants determined the necessity of appointing a chair.[46] If unresolved, the matter was referred to the Industrial Court, which had the power to make a binding determination.[47] All parties to the relevant award or agreement were obliged to attempt to resolve personal grievances as soon as practicable[48] using the standard mechanisms contained in the Act.[49] Parties were also obliged to abstain from any action that restricted the operation of the procedure and it was an obligation of the parties to promote the resolution of personal grievances.[50] Remedies available under s 117(7) were reimbursement of lost wages; reinstatement to the worker's former position or a position not less advantageous to the worker; and payment of compensation to the aggrieved worker. Approval could be granted by an Industrial Commission[51] for the adoption of a written alternative disputes procedure to that contained in the Act.[52]

In 1977 the Arbitration Court was established by way of an amendment to the *Industrial Relations Act 1973*.[53] The Court's main functions included the settlement of personal grievances that had not been resolved at mediation.[54]

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[46] *Industrial Relations Act 1973*, s 117 (4) (e).
[47] Ibid. The Industrial Court was established by s 32 and it replaced the Court of Arbitration.
[48] *Industrial Relations Act 1973*, s 117(4)(b).
[49] See D L Mathieson, *Industrial Law in New Zealand* (Supplement 1975) 21–22 for details of standard personal grievance procedure.
[50] *Industrial Relations Act 1973*, s 117(4)(j).
[51] The Industrial Commission was established by *Industrial Relations Act 1973*, s 17(1). Its jurisdiction was contained in s 26 which included 'settling disputes of interest; and any other functions conferred on it by legislation'.
[52] *Industrial Relations Act 1973*, s 117(3). A Szakats, *Introduction to the Law of Employment* (1975) 309–310.
[53] *Industrial Relations Amendment Act 1977*, s 32.

2.2.2 *LABOUR RELATIONS ACT 1987*

In 1985, the Labour Government circulated a green paper on reform of the industrial relations system.[55] The purpose of the paper was to generate debate on the industrial relations regime and to encourage participants in the system to comment. This process culminated in the passage of the *Labour Relations Act 1987*.[56] The Government's intention was to move towards an industrial relations system where the roles of all parties were clear and where the participants could take responsibility for their actions.[57] It was also emphasised that the new legislation would enable the parties to 'conclusively settle' a personal grievance without recourse to a strike or lockout.[58] Section 209(e) of the *Labour Relations Act 1987* made it unlawful for settlement of a personal grievance to be disrupted by deliberate lack of co-operation of any person. The Act required all awards and agreements to contain procedures for the resolution of personal grievances or for the insertion of standard clauses from the Act's sixth schedule where no alternative procedure was agreed.[59] Access to the personal grievance procedure was dependent upon union membership at the time the personal grievance was submitted, except in limited

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[54] *Industrial Relations Act 1973*, s 48(b)(c).
[55] Department of Labour, *Industrial Relations: A Framework for Review* (1985) vol 1. See also Department of Labour, *Industrial Relations: A Framework for Review,* vol 2, and Department of Labour, *Industrial Relations: A Framework for Review, Summary of Submissions* (1986).
[56] Department of Labour, *Industrial Relations: A Framework for Review* (1985) vol 1, 3.
[57] Ibid.
[58] Labour Relations Bill 1987, Explanatory Note vi.
[59] *Labour Relations Act 1987*, s 215. (For an outline of the distinction between awards and agreements, see above n 14 and accompanying text).

circumstances.[60] 'Parties' to a personal grievance were the union representing the worker and the relevant employer party.[61]

Under the *Labour Relations Act 1987*, Grievance Committees were established to hear personal grievances.[62] Award and agreement enforcement was transferred from the Department of Labour to the parties involved.[63] If the Grievance Committee was unsuccessful in resolving the personal grievance, the standard personal grievance procedure provided for the final determination to be made by the Labour Court.[64] The *Labour Relations Act 1987* also established a nation-wide Mediation Service[65] that was independent of any government department or agency.[66]

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[60] *Labour Relations Act 1987*, ss 209(d) and 216. Exceptional circumstances were described in s 218(1) as: (a) the worker's inability to have the grievance dealt with, or dealt with promptly, by the worker's union or the employer, or (b) discrimination against the worker due to membership of a union or an organisation which has applied to be registered as a union, or (c) duress in relation to a worker's membership or non membership of a union, or (d) the holding of a certificate of exemption from union membership.
To bring a personal grievance, the worker did not have to be a union member at the time of the actual dismissal, but was required to join a union to access the personal grievance procedures. See *NZ Workers IOUW v Proprietors of Tahora 2F2 – Papuni Station* (1990) 3 NZELC 97, 325.

[61] Ibid, s 216(1) and (2). Section 83 of the *Labour Relations Act 1987* stated that if a worker held a strong objection to union membership on the grounds of deeply held personal conviction or conscience, they could apply under s 82 of the same Act, for a certificate of exemption from the Secretary of the Union Membership Exemption Tribunal. Section 95(2) provided that a certificate of exemption when granted meant that the person to whom it had been granted would be treated as if they were a member of a union.

[62] Clause 7 sch 7, *Labour Relations Act 1987* provided that a Grievance Committee was to have an equal number of representatives from employer and union parties, and a Chairperson who would be a mediator appointed from the Mediation Service.

[63] Department of Labour, *Industrial Relations: A Framework for Review* (1985).

[64] *Labour Relations Act 1987* s 217(1)(b).

[65] Ibid, s 251(1).

[66] Ibid, s 217.

An appeal from a decision of a Grievance Committee was heard by the Labour Court[67] on a *de novo* basis. Both parties had the opportunity to be heard in full and to bring evidence as if the Grievance Committee had not heard it.[68] The Labour Court was established as a court of record[69] with the right to appeal to the Court of Appeal.[70] Section 295 of the *Labour Relations Act 1987* removed the tripartite nature of dispute resolution in the specialist court, except in the case of personal grievances and demarcation disputes.[71]

The personal grievance procedures remained restricted to union members through s 209(d) of the *Labour Relations Act 1987*. However, a non-union member could take action against his or her employer in the Small Claims Tribunal[72] or they could take common law action in the ordinary courts.[73]

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[67] *Labour Relations Act 1987*, sch 7, cl 15(1).
[68] Ibid, s 218(2).
[69] Ibid, s 278. In 1998, the Employment Court was held to be an inferior court. See *Attorney General v Reid* [2000] 2 NZLR 377 (HC).
[70] *Labour Relations Act 1987*, ss 309–313. Section 312 stated that appeals could be made by any party who was dissatisfied with any decision of the Labour Court, except if it was on the grounds of the construction of any award or agreement.
[71] See *Labour Relations Act 1987*, s 217(2) which provides for a judge with two panel members to hear personal grievance cases. Section 108 provided that a judge and two panel members also heard demarcation disputes.
[72] See *Small Claims Tribunals Act 1976*, s 9(1)(a) which gave jurisdiction to the Small Claims Tribunal to hear claims based on contract or quasi contract. This section was carried forward to the *Disputes Tribunal Act 1988*, s 10(1)(a).
[73] J Hughes, *Labour Law in New Zealand* (1990) ch 3, part VII.

2.2.3 THE STATE SECTOR

Prior to 1987, industrial relations practice in the State Sector was the subject of distinct, separate legislation.[74] However, the *State Sector Act 1988* synchronised industrial relations in both the public and private sectors.[75] There was no longer a separate procedure for settling personal grievances in the public sector. All personal grievances became subject to the same mechanism as applied to the private sector.[76]

2.2.4 DEFINITIONS OF PERSONAL GRIEVANCES UNDER THE *LABOUR RELATIONS ACT 1987*

The *Labour Relations Act 1987* defined personal grievances as:[77]

> (1) For the purposes of this Act, 'personal grievance' means any grievance that a worker may have against the worker's employer or former employer because of a claim-
>
> (a) That the worker has been unjustifiably dismissed; or
>
> (b) That the worker's employment, or one or more conditions thereof, is or are affected to the worker's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any award or agreement); or
>
> (c) That the worker has been discriminated against in the worker's employment; or
>
> (d) That the worker has been sexually harassed in the worker's employment; or

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[74] *State Services Act 1962*, s 56 and s 58(6); *Education Act 1964*, ss 157–161, ss 175–180; and *Health Services Personnel Act 1983*, s 37. See J Hughes, *Labour Law in New Zealand* (1989) ch 15, part XI.
[75] *State Sector Act 1988*, s 67 provided that the *Labour Relations Act 1987* would apply to the Public Service.
[76] J Hughes, *Labour Law in New Zealand* (1990) ch 4, part II.
[77] *Labour Relations Act 1987*, s 210. A discussion of case law on this topic will be covered under the 'Employment Contracts Act' heading. The relevant definitions of personal grievances are identical, save for purely grammatical changes, under s 27 of the *Employment Contracts Act 1991*.

(e) That the worker has been subject to duress in the worker's employment in relation to membership or non-membership of a union.

Section 210(1)(d) provided that 'sexual harassment' became a ground for a personal grievance. However, under s 226, workers experiencing sexual harassment or complaints of discrimination were required to choose whether to use the personal grievance regime or to make a complaint to either the Human Rights Commission or the Race Relations Conciliator.[78]

2.2.5 REMEDIES UNDER THE *LABOUR RELATIONS ACT 1987*

Sections 227–229 of the *Labour Relations Act 1987* indicated the remedies available when a personal grievance had been proven. They were: reinstatement, reimbursement, compensation and recommendations.[79] The Act stated that 'reinstatement' was the primary remedy available to a dismissed worker.[80]

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[78] *Labour Relations Act 1987*, s 226(1)(a)(b). However, under the *Human Rights Commission Act 1977*, sexual harassment was not a ground per se, but actions could be brought under the heading of sex discrimination. See *H v* E (1985) 5 NZAR 333. Sexual Harassment is now a separate ground under the Human Rights Act 1993, s 62.

[79] See J Hughes, *Labour Law in New Zealand* (1989) 4.515–4.535 for a discussion of s 227 remedies. See also A Szakats and M A Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, 1990) 134–137.

[80] *Labour Relations Act 1987*, s 228.

2.3 *EMPLOYMENT CONTRACTS ACT 1991*

2.3.1 POLITICAL DEVELOPMENT

When the National Government came to power in 1990 it had a strong commitment to reforming the industrial relations system. Fundamental policy issues raised during discussion of the hastily introduced Employment Contracts Bill 1990, included the question of retention or otherwise of the specialist institutions and the procedures to be followed during disputes and personal grievances.[81] The Minister of Labour, Bill Birch, claimed that the new institutional framework:[82]

> …will be more democratic and more accessible than in the past. Furthermore, these bodies will be accessible to all employees; no longer will employees have to belong to a union to pursue [sic] a personal grievance.

Prior to the introduction of the Employment Contracts Bill, the Government issued an 'options' paper, which presented four possible options for the specialist institutions to operate within, and for the resolution of personal grievances.[83] The options raised in relation to employment institutions were: retention of the Labour Court and Mediation

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[81] See R Ryan and P Walsh, 'Common Law v Labour Law: The New Zealand Debate' (1993) AJLL 230; and B Boon, 'Procedural Fairness and the Unjustified Dismissal Decision' (1992) 17 NZJIR 301. Also see P Walsh and R Ryan, 'The Making of the Employment Contracts Act' in R Harbridge (ed), *Employment Contracts: New Zealand Experiences*, (1993). Walsh, reviewing the legislative process, records the Select Committee as recommending:
(i) that the specialist institutions should be retained,
(ii) that an Employment Tribunal be established providing both a mediation and adjudication function,
(iii) that the Employment Court be established, being a court of record hearing appeals from decisions of the Employment Tribunal; and
(iv) that all employment contracts disputes should be heard and determined by the specialist labour law institutions, and not split between them and the ordinary civil courts.

[82] [1991] 514 NZPD 1437.

[83] Report of the Labour Committee on the Employment Contracts Bill, April 1991.

Service; creation of a specialist lower tribunal with retention of the Labour Court; creation of a specialist lower tribunal and abolition of the Labour Court, with appellate rights to the High Court; or abolition of all specialist institutions.

Similarly, the options raised in relation to personal grievance procedures were retention of provisions contained in the Employment Contracts Bill;[84] retention of personal grievance provisions as a legislated minimum condition; no provision for personal grievances other than that available under common law; or optional inclusion of prescribed personal grievance procedures in employment contracts.

The options paper produced vigorous debate, which eventually culminated in the establishment of an Employment Tribunal. The Minister of Labour, Bill Birch, had claimed that the Employment Tribunal would 'provide easy, quick and inexpensive access for all New Zealanders to pursue personal grievance procedures where necessary'.[85]

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[84] Ibid. The Employment Contracts Bill 1991 attempted to provide non-discriminatory access to employment, equal treatment in employment and protections against unjustified loss of employment. The Bill provided that personal grievance procedures were required to be included in collective employment contracts, and were discretionary in individual employment contracts.
[85] W F Birch, *Report Back Speech Notes* – Press Release 22 April 1991.

When the *Employment Contracts Act 1991* was enacted, employers were required to recognise the representatives of employees[86] but the Act did not require the parties to negotiate nor did it recognise the existence of unions, instead it recognised employees organisations which had the right to represent employees. Section 2 of the Act defined 'employee's organisation' as:[87]

> any group society association or other collection of employees however described and whether incorporated or not which existed in whole or in part to further the employment interests of the employees belonging to it.

The legislation contained no mention or recognition of unions and placed no obligation on employers to discuss employment matters with them. Further, the removal of unions as formal bargaining agents was reflected in unions not being formally recognised as parties to personal grievances.[88]

One significant intention of the *Employment Contracts Act 1991* was to 'de-collectivise' the New Zealand workforce.[89] Harbridge estimated 'over 110,000 workers lost their collective bargaining coverage' in the first major wage round after the Act's introduction,[90] and by 1997 a Department of Labour survey noted that employees under the *Employment Contracts Act 1991* were covered in equal proportions by individual and

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[86] *Employment Contracts Act 1991*, s 12(2) and s 59(1). For further discussion on representation and the duty to recognise see *Mazengarb's Employment Law*, (5th ed, 2000) Part II, 12.2–12.3A.
[87] *Employment Contracts Act 1991*.
[88] See P Roth, 'Editorial: The Cost of "Individualising" Labour Law' [1997] 5 ELB 81–96.
[89] See P Walsh and R Ryan, 'The Making of The Employment Contracts Act' in R Harbridge (ed), *Employment Contracts: New Zealand Experiences* (1993) 13–30.
[90] R Harbridge, 'Bargaining and the Employment Contracts Act: an overview' in R Harbridge (ed) *Employment Contracts: New Zealand Experiences* (1993) 34.

collective contracts. The Act also facilitated a trend for smaller employers to utilise individual contracts.[91]

2.3.2 STRUCTURE OF INSTITUTIONS

The Objects section of Part III of the *Employment Contracts Act 1991* provided that:

> (a) All employment contracts must contain an effective procedure for the settlement of personal grievances:
>
> (b) Personal grievances are distinguishable from disputes by their subject matter and not by the number of employees involved:
>
> (c) The application of a personal grievance procedure is not able to be frustrated by deliberate lack of co-operation on the part of any person:
>
> (d) The remedy for a proven grievance is determined in each case by the circumstances of the case:
>
> (e) The personal grievance procedure is an alternative to, and is not in addition to, any right to make a complaint under the *Human Rights Commission Act 1977* or the *Race Relations Act 1971*.

Section 77 of the *Employment Contracts Act 1991* established the Employment Tribunal to hear, amongst other matters, personal grievances which had not been successfully resolved at mediation or where direct application had been submitted to resolve differences between parties to employment disputes.[92] The Employment Court was created as a Court of Record under s 103 of the *Employment Contracts Act 1991*.[93]

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[91] Department of Labour, Industrial Relations Service, *Survey of Labour Market Adjustment Under the Employment Contracts Act* (August 1997) 18–19. See also R Harbridge and K Hince, 'The Employment Contracts Act: An Interim Assessment' (1994) 19 NZJIR 235.
[92] *Employment Contracts Act 1991*, ss 76–79. See *Mazengarb's Employment Law*, 5th ed (2000) 76–79.
[93] See s 104 of the *Employment Contracts Act 1991* for details of the jurisdiction of the Employment Court.

Section 78 of the *Employment Contracts Act 1991* stated that the functions of the Employment Tribunal included: assisting employees and employers to resolve differences; providing mediation; adjudicating differences between parties; and providing mediation assistance outside the general terms of its jurisdiction, including where no formal application for mediation had been received.[94]

Section 79 of the *Employment Contracts Act 1991* established the jurisdiction of the Employment Tribunal, which included the provision of mediation assistance; adjudication of personal grievances and disputes; adjudication of all recovery of wages and other monetary claims; the recovery of penalties; compliance orders; and breach of contract actions.

A significant proportion of the work undertaken by the Tribunal was the provision of mediation services. A 1999 study indicated that 'over 70%' of all personal grievance cases brought before the Tribunal were resolved in mediation.[95]

Pursuant to the *Employment Contracts Act 1991*, personal grievances could be settled in two ways before a mediator. First, the parties could agree to, and reach, a voluntary settlement or, alternatively, the parties could mutually give the mediator authority to

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[94] *Employment Contracts Act 1991*, s 78.
[95] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 NZJIR 365.

adjudicate.[96] In the latter situation, the decision was final, binding and enforceable by the parties.[97] If voluntary mediation failed, the applicant could refer the matter to a formal Employment Tribunal adjudication hearing.[98] Any party could apply to the Employment Tribunal to have the matter referred to the Court;[99] if the matter involved questions of urgency or significant legal issues, the Tribunal could order that the proceedings be heard in the Employment Court.[100] If the Tribunal did not remove proceedings to the Court, the Court could hear the matter if special leave was granted by the Court. The Court could grant special leave for the matter to be heard under the same criteria that were used by the Tribunal, namely, significant legal issues or urgency.[101] It was also possible, at first instance, to have a personal grievance or dispute resolved by adjudication. Mediation was not a prerequisite to adjudication.[102]

Section 3 of the *Employment Contracts Act 1991* gave the Employment Tribunal and the Employment Court exclusive jurisdiction to hear all disputes and personal grievances 'founded on an employment contract'. Within its specialist employment law jurisdiction, the Employment Court had authority to hear appeals from the Employment Tribunal.[103] If dissatisfied with the decision of the Employment Court, appeal could be made to the

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[96] *Employment Contracts Act 1991*, s 88(2).
[97] *Shaffer v Gisborne High School Board of Trustees* [1995] 2 NZLR 288 (CA).
[98] *Employment Contracts Act 1991*, s 78.
[99] Ibid, s 94(1).
[100] Ibid, s 94.
[101] Ibid, s 94 (3).
[102] Ibid, ss 78(3) and 78(6).
[103] Ibid, s 104(1)(a).

Court of Appeal on a question of law.[104] In limited circumstances, the Court of Appeal could refer a case back to the Employment Court for reconsideration.[105]

2.3.3 CATEGORIES OF PERSONAL GRIEVANCE UNDER THE *EMPLOYMENT CONTRACTS ACT 1991*

The *Employment Contracts Act 1991* defined personal grievances in s 27(1). This definition was, for all practical purposes, identical to that contained in s 210 of the *Labour Relations Act 1987*. Section 27(1) provided:

> For the purposes of this Act, 'personal grievance' means any grievance that an employee may have against the employee's employer or former employer because of a claim-
>
> (a) That the employee has been unjustifiably dismissed; or
>
> (b) That the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation of any provision of any employment contract); or
>
> (c) That the employee has been discriminated against in the employee's employment; or
>
> (d) That the employee has been sexually harassed in the employee's employment; or
>
> (e) That the employee has been subject to duress in the employee's employment in relation to membership or non-membership of an employee's organisation.

In practice, a personal grievance could encompass more than one ground, for instance, an unjustified dismissal claim might also comprise concurrent sexual harassment and discrimination claims.[106] Alternatively, the Employment Tribunal may have found that the

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[104] Ibid, s 135.
[105] Ibid, s 136.
[106] Ibid, sch 1, cl 3, which discussed the written statement of grievance, stating that the employee was required to set out the nature of the grievance, the facts giving rise to the grievance and the remedies

personal grievance was brought under the wrong head of grievance and found that a different type of personal grievance was established.[107]

2.3.3(a) Unjustifiable dismissal

Unjustifiable dismissal[108] represented the most common ground of personal grievance.[109] To successfully bring this head of grievance a grievant had to initially establish that a dismissal had occurred.[110] This involved establishing that an employment contract was in force[111] and that an employer/employee relationship existed at the point of dismissal.[112]

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sought. Nothing in these provisions restricted the number of grounds on which a personal grievance could have been taken.

[107] *Employment Contracts Act 1991*, s 34.

[108] ILO Convention 158 defined 'dismissal' as 'the termination of employment at the initiative of the employer. This covers both actual and constructive dismissal, and dismissal either with or without notice.' Quoted in: *Wellington Clerical Union v Greenwich* [1983] ACJ 965.

[109] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24(3) NZJIR 365.

[110] There was no dismissal if there was a mutual agreement to terminate employment: see *COMPASS Union of NZ Inc v Direct Mail Processes Ltd* [1991] 2 ERNZ 645; *Hodgkiss v Palmerston North City Council*, unreported, WEC 46/96; *Hawkes v DML Resources Ltd*, unreported, AEC 73.97; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 3.2.

[111] *Employment Contracts Act 1991*, s 2 included in its definition of 'employee' a person intending to work. See *Canterbury Hotel Etc IUW v The Elms Motor Lodge Ltd* [1989] 1 NZILR 958 where it was held that a dismissal could occur at any time after an employment contract had been taken effect, regardless of whether or not work had actually commenced.

[112] For a person to be entitled to bring a personal grievance they had to prove that they were an employee at the time of the grievance: see *TNT Express WorldWide Ltd v* Cunningham [1993] 1 ERNZ 695; *Muollo v Rotaru* [1995] 2 ERNZ 414. It was also necessary to prove that the respondent named was the correct employer on the balance of probabilities: see *Service Workers Union of Aotearoa v* Chan [1991] 3 ERNZ 15. For more detailed discussion on these points refer, to *Mazengarb's Employment Law* 5th ed (2000) Part III, 27.5.

Where the termination of employment arose from the expiry or termination of a 'fixed term' contract the situation was less clear.[113] Simply allowing a fixed term contract to expire was not, of itself, a ground for taking a personal grievance alleging an unjustified dismissal.[114] However, a continued or indefinitely extended employment relationship may have been established if the employee could bring evidence to show that the contract was a sham, had been varied so as to provide for an indefinite term, or that actions of the employer had genuinely created a legitimate expectation of renewal.[115] In these circumstances, using the contract's expiry as a means of terminating the employment could be viewed as a dismissal capable of challenge.[116] A forced or 'constructive' dismissal, involving elements of 'repudiatory' employer conduct that led to an 'involuntary' resignation, could also found an action of unjustified dismissal.[117]

Once the fact of dismissal and surrounding circumstances had been established, the employer had the evidential burden of proving that it was justified.[118] Justification has two distinct but interrelated elements. First, there must have been substantive reasons,

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[113] P Churchman, 'Fixed Term Contracts' Employment Law Conference (1998: Wellington) 11–22; W C Hodge, 'Employment Law' [1997] NZLR 531.
[114] See *Actors IUW v Auckland Theatre Trust* Inc 2 NZLR 154, where it was held that the failure to renew a fixed term contract may in some circumstances comprise an unjustified dismissal. See also *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116, 124.
[115] See H Fulton, 'Legitimate Expectation', NZLS Employment Law Conference Papers, 1996.
[116] *The Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116, 134. See also J Hughes, 'Fixed Term Contracts in the Private Sector After Hagg' (1997) 3 ELB 41–60.
[117] See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, where the Court of Appeal held that constructive dismissal could mean, but was not restricted to, three different types of action by an employer. These were: where the employer gives an employee a choice between resigning or being dismissed; where an employer has followed a course of conduct deliberately intending to coerce the employee into resigning; or where a breach of duty by the employer leads the employee to resign.
[118] *Wellington Road Transport IUW v Fletcher Construction Ltd* [1983] ACJ 653.

such as misconduct or an accumulation of misdemeanours by the employee serious enough to justify the dismissal. Second, the procedure used to dismiss the employee must have been demonstrably, procedurally fair.[119] If both elements of justification could not be established, the employee may have had a valid personal grievance.[120] The two elements of substantive and procedural unfairness were not always considered as separate entities but were interrelated.[121] A fair and more appropriate test was considered by Goddard CJ to be what, under the particular circumstances, it was open to a fair and reasonable employer to do; this was suggested as a more useful approach than a legal distinction between substantive and procedural matters of fairness.[122] The Court of Appeal decided that issues of substantive and procedural fairness could not be treated separately from each other.[123]

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[119] See L Freyer, 'Unjustifiable Dismissal: Procedural Fairness and the Employer' (1997) 22 NZJIR 143.
[120] *Auckland City Council v Hennessy* [1982] ACJ 699, 98.
[121] *Nelson Air Ltd* v *NZALPA* [1994] 2 ERNZ 665, 668. In this case the Court of Appeal stated, 'it is often convenient to distinguish between procedural and substantive unfairness. But there is no sharp dichotomy. In the end the overall question is whether the employee has been treated fairly in all the circumstances.' See G Anderson, 'Personal grievance – Dismissal – Procedural Fairness – Probationary Period' (1995) 1 ELB 8.
[122] *Unkovich v Air New Zealand Ltd* [1993] 1 ERNZ 526, 548-550.
[123] *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243, 255. Cooke P stated, 'In considering the duties of a reasonable employer it is often convenient to use as different heads of discussion substantive justification and procedure, but there is no sharp dividing line…it is not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if these were mutually exclusive…'. See also G Anderson, 'Reforming Procedural Fairness Requirements' [1998] 6 ELB 109–132; and G Anderson, 'Redundancy – Personal Grievance – Unjustified Dismissal – Principles' (1994) 8 ELB 120–123.

2.3.3(B) UNJUSTIFIABLE ACTION BY THE EMPLOYER RESULTING IN THE EMPLOYEE'S DISADVANTAGE

Section 27(1)(b) of the *Employment Contracts Act 1991* provided that, where an employee's employment,[124] or one or more conditions thereof[125] was altered to the employee's disadvantage[126] by an unjustifiable action[127] by the employer, the employee had access to a personal grievance action. If however, the action complained of was an action derived solely from the interpretation, application or operation of a contract or a disputed interpretation, application or operation of any provision of any employment contract, the party would have no access to a personal grievance.[128]

In defining 'unjustifiable action', the Employment Court indicated that no tests of general application could be taken from case law concerning the justification of employers actions. The Employment Tribunal and Employment Court approach was one of factual enquiry.[129]

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[124] *Northern Clerical Etc IUW v South Auckland Taxis Association* [1987] ACJ 342, where it was held that the disadvantage had to relate to employment.
[125] The Court has interpreted this to mean that the employee must have been deprived of a benefit of employment to which he/she was entitled under the employment contract: In *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineering etc IUW* [1989] 3 NZILR 785 Hardie Boys J opined that if the matter complained of affected a matter outside the employee's employment, it was irrelevant for the purposes of taking a personal grievances.
[126] See below n 129–133 and related text for a discussion on the meaning of disadvantage.
[127] For there to be grounds for a grievance the employer had to have taken some action which was unjustifiable. The question to be asked here was whether the reasonable and fair employer would have taken this action in the circumstances: *Northern Distribution Union v BP Oil (NZ) Ltd* [1992] 3 ERNZ 483. 'Unjustifiable' relates to both substantive cause and procedural fairness: *Northern Distribution Union v Farmers Trading Co Ltd* (1990) NZELC 98,098.
[128] *Employment Contracts Act 1991*, s 27(1)(b).
[129] *Flight Attendants and Related Services Assn Inc v Air New Zealand* [1993] 2 ERNZ 1.

In *Aoraki Corporation Ltd v McGavin*,[130] the Court of Appeal found that it was not legislatively clear whether, in a dismissal involving redundancy, issues of procedural fairness were better dealt with under the category of unjustifiable dismissal or as an unjustifiable action claim. In this case the Court held that there was no need to conclude the issue, as the test for justification was the same as that applicable in unjustifiable dismissal cases.

In unjustified action cases the Employment Court held that the onus of proving justification rested with the employer.[131] However, it was presumed that the employee must at least show that the action occurred and that disadvantage resulted.[132] In regard to what constituted 'disadvantage', the Court of Appeal decided that the concept was not restricted to material or financial loss.[133] The Court of Appeal held that a final warning could constitute disadvantage, as it rendered the employee's employment less secure.[134] Loss of other conditions such as job satisfaction[135] or status and self-esteem[136] also founded disadvantage claims.

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[130] [1998] 1 ERNZ 601 (Full Court).
[131] *Post Office Union (Inc) v Telecom (Wellington) Ltd* [1989] 3 NZILR 527 and *Northern Local Government Officers Union v Waitakere City Council* [1991] 2 ERNZ 753.
[132] J Hughes, P Roth, G Anderson (eds), *Personal Grievances* (1999) 7.5–7.6. *Mazengarb's Employment Law* (1999) 27.61–27.62; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC27.11–EC27.11A.
[133] *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineering etc IUW* [1989] 3 NZILR 785.
[134] Ibid.
[135] *NZ Assn of Polytechnic Teachers Inc v Northland Polytechnic Council* [1990] 2 NZILR 723.
[136] *Eric Woods Motor Cycles Ltd v NZ Distribution etc Union* [1990] 3 NZLR 807; *NZ (with exceptions) Shipwrights etc Union v GN Hale and Son Ltd* [1991] 3 ERNZ 931; *Northern Local Government Officers Union v Waitakere City Council* [1990] 2 ERNZ 753.

The Employment Court indicated that non-promotion may also found a disadvantage claim if there was a clear, structured promotional framework in operation,[137] an approach endorsed by the Court of Appeal in *Victoria University of Wellington v Haddon*.[138] In this case, it was held that where reasonable opportunities arose for promotion, the employee could reasonably expect fair treatment.[139]

One problem that employees could have faced under the unjustifiable action provisions was that the employee had an obligation to show that the disadvantage related directly to their employment or one or more conditions of employment. This was interpreted to mean that there must be a breach of contractual obligation or contractual entitlement,[140] which was restricted to the 'on the job' situations.[141] For example, withdrawal of staff travel concessionary benefits was held not to represent a contractual right and did not relate to the contractual conditions of employment.[142]

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[137] *NZ Airline Pilots Assn v Air NZ Ltd* [1992] 3 ERNZ 73.
[138] [1996] 1 ERNZ 139, 149.
[139] G Anderson, 'Employment Contracts Act 1991 s 27(1)(b) – Unjustifiable Disadvantage – Failure to Appoint to a new Position' (1996) 5 ELB 87.
[140] *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139; *Principal of Auckland College of Education v Hagg* [1996] 1 ERNZ 150.
[141] *Wellington Area Health Board v Wellington Hotel Etc Trades Union* [1992] 3 NZLR 658. In this case, 'on the job' was directed to the extent to which the employee must be affected to come within the ambit of the section, not to the fact of employment.
[142] *Leitman v Air NZ Ltd* [1989] 3 NZILR 434. See P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC27.11; J Hughes, P Roth, G Anderson (eds), *Personal Grievances* (1999) 7.5; *Mazengarb's Employment Law* (2000) 27.61–27.62.

2.3.3(c) DISCRIMINATION IN EMPLOYMENT

Section 28(1) of the *Employment Contracts Act 1991* provided an employee with a personal grievance action for discrimination if the employer offered different terms or conditions of employment or dismissed the employee on the grounds of race; colour; ethnic or national origin;[143] sex;[144] marital status;[145] religious or ethical belief, or age;[146] or by reason of the employee's involvement in an employees' organisation.[147] The *Human Rights Act 1993* s 21 extended the definition of discrimination to include disability, political opinion, family and employment status, and sexual orientation.[148] However, these extended definitions of discrimination were not included in the *Employment Contracts Act 1991*.[149]

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[143] The words 'race', 'ethnic origin', and 'colour' were held to be 'associated with one another in such a way that each word gives colour to the meaning of the other': *King-Ansell v Police* [1979] 2 NZLR 531 (CA); *Race Relations Conciliator v Marshall* [1993] 2 ERNZ 290.

[144] There was discrimination on the basis of sex if the relevant person would have received the same treatment as a person of the opposite sex, but for their own sex: *Trilford v Car Haulaways Ltd* [1996] 2 ERNZ 351. See also I Adzoxrnu, 'Indirect Discrimination in Employment' [1997] NZLJ 216.

[145] This included married or separated partners and de facto partners living together in the nature of marriage: *Proceedings Commissioner v NZ Post Ltd*, unreported, EOT 3/91. *Human Rights Act 1993* defines marital status as: single; married; married but separated; party to a marriage now dissolved; widowed; or living in a relationship in the nature of marriage.

[146] *Employment Contracts Act 1991*, s 28(3): for the purposes of this section, age, ethnic or national origins and ethical belief had the meanings given to them by the *Human Rights Act 1993*. See *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407 for an example of age discrimination.

[147] *Employment Contracts Act 1991*, s 28(2) contained an extended definition of when an employee was deemed to have been involved in the activities of an employees' organisation. See *Tranz Rail Ltd v Rail and Maritime Transport Union (inc)*, unreported, 3 May 1999, CA 149/97. This decision provided a detailed analysis of s 28(1) *Employment Contracts Act 1991*. See also C Bourne and J Whitmore, *Race and Sex Discrimination* (2nd ed) 1993; G Anderson, 'The Employment Contracts Act: An Employer's Charter?' (1991) 16 NZJIR 147; and J Hughes, 'Protecting the Job Delegate' (1979) 4 OLR 380.

[148] See P Kiely and A Caisley, 'Discrimination in Focus' (1992) 17 NZJIR 359; and P Kiely, 'Discrimination and Human Rights: An overview of Remedies' (1993) 18 NZJIR 362.

[149] For example, see *Pooley v NZ Society for the Intellectually Handicapped Inc*, unreported, AT 102/95. It was held that the Employment Tribunal did not have jurisdiction to hear a complaint of discrimination on

Discrimination could either have been direct or indirect, although there was no statutory basis for this distinction in the *Employment Contracts Act 1991*.[150] For example, a particular policy or activity may clearly be discriminatory in nature, such as an employer paying different rates of pay for men and women performing the same task; or discrimination may be indirect, where the action on the surface appears fair, but the underlying principle or policy is discriminatory in operation.[151]

Unlike other types of personal grievance, actions based on discrimination shifted the burden of proof from the employer. In such cases, the employee had to establish the existence of discrimination. The standard of proof required was on the balance of probabilities.[152]

2.3.3(D) SEXUAL HARASSMENT

Section 29(1) of the *Employment Contracts Act 1991* gave an employee access to a personal grievance action if the employer or a representative of their employer had

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the grounds of sexual orientation if this was the only ground for complaint. See also P Kiely, 'Discrimination and Human Rights: An Overview of Remedies' (1994) 18 NZJIR 362; J Hughes, 'Discrimination – The Missing Grounds' [1995] ELB 75; and P Bascand and S Frawley, 'Possible Consequences of the Employment Contracts Act for People with Disabilities' (1991) 16 NZJIR 309.

[150] *Trilford v Car Haulaways Ltd* [1996] 2 ERNZ 351, 373–374, discussed in G Anderson, 'Employment Contracts Act, s 28(1)(a) – Personal Grievance – Discrimination – Constructive Dismissal' [1996] ELB 129.

[151] J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 8.3; *Mazengarb's Employment Law* (1999) 28.5; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC28.04.

[152] *Post Office Union (Inc) v Telecom (Wellington) Ltd* [1989] 3 NZILR 527, followed in *NZ Air Line Pilots Assn (Inc) v Air NZ Ltd* [1992] 3 ERNZ 73. See *Mazengarb's Employment Law* (1999) Part III, 28.6; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 8.11; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC28.11.

sexually harassed that employee in their employment.[153] In *Z v A* Goddard CJ described sexual harassment as:

> poison[ing] the atmosphere in the workplace. It is wholly unacceptable and entirely devoid of any redeeming features. It follows that its occurrence can never be met with matters of justification, excuse or mitigation. It is an attack on the basic human right that all persons must be supposed to have to pursue their economic well being in conditions of freedom and dignity. Its victims are almost invariably women.[154]

The *Employment Contracts Act 1991*, s 29(1)(a)–(b) provided that an employee was sexually harassed in that employee's employment[155] if that employee's employer or a representative of that employer[156] (a) made a request of that employee for sexual intercourse, sexual contact or other form of sexual activity which contained – (i) an implied or overt promise of preferential treatment in that employee's employment; or (ii) an implied or overt threat of detrimental treatment in that employee's employment; or (iii) an implied or overt threat about the present or future employment status of that

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[153] For a thorough overall discussion on sexual harassment issues, cases, and principles see W Davis, *Feminist perspective on Sexual Harassment in Employment Law in New Zealand*, Industrial Relations Research Monograph No 3, Wellington 1994; and M Keith, 'Sexual Harassment Case Law under the Employment Contracts Act 1991' (2000) 25 NZJIR 303.

[154] *Z v A* [1993] 2 ERNZ 469, 472. See also S Varnham, 'Just Another Pat on the Bottom' (1999) 6 ELB 106.

[155] 'Employment' was not restricted to the employer's premises or other work site. It was the relationship between employer and employee which was significant, not the area where the incident took place. See *Smith v Christchurch Press Co Ltd* [2001] 1 NZLR 407; [2000] 1 ERNZ 624, which discussed conduct that occurred outside of employment but was deemed to have been close enough to have an effect on the complainant's employment. See also J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 9.3; *Mazengarb's Employment Law* (1999) 29.8; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC29.04.

[156] *Employment Contracts Act 1991*, s 27(2) defined 'representative' in relation to a personal grievance as a person who was employed by the same employer and who had either, authority over the employee alleging the grievance, or was a person who had authority over other employees in the same workplace as the person alleging the grievance. See *Northern Distribution Union v AB Ltd* [1988] NZILR 761.

employee;[157] or (b) by (i) the use of words (whether written or spoken) of a sexual nature;[158] or (ii) physical behaviour of a sexual nature,[159] – subjected the employee to behaviour which was unwelcome or offensive to that employee (whether or not that was conveyed to the employer or representative)[160] and which was either repeated or of such a significant nature that it had a detrimental effect on that employee's employment, job performance or job satisfaction.[161]

Section 35 of the *Employment Contracts Act 1991* stated that evidence of a person's previous sexual experience was not to be taken into account in sexual harassment allegations. It did not state that such evidence could not be adduced, but maintained that

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[157] *Managh v Crawford* [1996] 2 ERNZ 392.

[158] For discussion on making of crude statements, comments and remarks which constituted sexual harassment see *A v Z* [1992] 3 ERNZ 501. Also see *NID Distribution Workers IUW v AB Ltd* [1988] NZILR 761; *Fulton v Chiat Day Mojo Ltd* [1992] 2 ERNZ 38; and *Adkins v Turk's Poultry Farm Ltd* [1994] ERNZ 368. For a discussion on what type of comments and behaviour did not constitute sexual harassment see *X v Y Ltd* unreported, AT268/93 discussed by W Davis *A Feminist Perspective on Sexual Harassment*, Industrial Relations Research Monograph No 3, (1994) 96–98; W Davis, 'Sexual Harassment in the Workplace' (1994) 3 ELB 35.

[159] Clear cases of physical sexual harassment are covered by this area: *A v Foodstuffs (South Island) Ltd* [1993] 1 ERNZ 81. However, less obvious types of sexual harassment are also included, for example repeated touching, rubbing, or body contact: *Managh v Crawford* [1996] 2 ERNZ 392.

[160] The Employment Tribunal held this called for a two stage test: first was that there needed to be an objective assessment of whether the words or behaviour were of a sexual nature and if so, then a subjective test should be applied as to whether the employee found the behaviour offensive. See *A v Z* [1992] 3 ERNZ 501.

[161] *NID Distribution Workers IUW v AB Ltd* [1988] NZILR 761. If behaviour occurred more than once it was deemed to have been repeated: *L v M Ltd* [1994] 1 ERNZ 123. If the employee ceased work as a result of the behaviour, this was deemed to be detrimental to the employee, see *A v Z* [1992] 3 ERNZ 501. The meaning of detriment was interpreted to extend beyond constructive dismissal situations and to extend to cases where psychological and emotional discomfort resulted, absence from work, distress, and other related reactions. Detriment was held to exist when the employee ceased work: *Fulton v Chiat Day Mojo Ltd* [1992] 2 ERNZ 38. For a discussion of the policy issues see C Bacchi and J Jose, 'Dealing with Sexual Harassment: Persuade, Discipline or Punish?' (1994) 10 AJLS 1.

no account could have been taken of it.[162] Further, s 36 of the Act provided that an employer was required to take action whether or not the person perpetrating the sexual harassment was a co-employee, customer or client, upon receipt of a complaint from the employee which could have been in writing.[163]

In sexual harassment claims the onus of proof lay with the employee – the person making the allegation – to establish the facts alleged.[164] The standard of proof applicable in these situations was the balance of probabilities consistent with the gravity of the acts complained of and the resulting consequences.[165]

2.3.3(E) DURESS

Duress in employment on the basis of the employee's membership or non-membership of an employees' organisation was defined in s 30 of the *Employment Contracts Act 1991*. Duress was defined as occurring in either of the following situations: where membership

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[162] For a discussion on this topic see J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 9.13.

[163] It was indicated in *Turk's Poultry Farm v Adkins*, unreported, WEC 21/95, that whilst the absence of a formal written complaint could be fatal to an employee's claim of sexual harassment, if an employer failed to respond adequately to an oral complaint of sexual harassment, the employer could then be held responsible for constructive dismissal. Section 36(2)(b) provided that an employer should take whatever steps were practicable to prevent any repetition of requests or behaviour outlined in Section 29. In theory, the employer could dismiss the employee responsible for sexual harassment, however s 40(1)(d) provided alternative remedies to dismissal of an offending employee including transfer, disciplinary or rehabilitative action; consequently there were other practicable steps to resolving the situation as well as dismissal. See *B v NZ Amalgamated Engineering Union Inc* [1992] 2 ERNZ 554.

[164] G Anderson, 'Sexual Harassment – standard of proof' (1993) 7 ELB 99.

[165] *Managh (t/a Managh and Associates and Café Down Under Ltd) v Wallington* [1998] 2 ERNZ 337 (CA). See *Mazengarb's Employment Law* (2000) 29.6; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (1999) EC29.05; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 9.4.

or non-membership of an employees' organisation was made a condition by the employer of that employee's employment;[166] or where an employer exerted on an employee undue influence,[167] or an offer or threat of any monetary incentive, advantage or disadvantage with the intention[168] of inducing[169] the employee to act in a particular way in relation to their membership and participation in an employees' organisation.[170] An employee may have had access to a personal grievance on the basis of duress when the principle of freedom of association contained in Part 1 of the *Employment Contracts Act 1991* had been violated.[171]

An employee alleging duress by his or her employer was entitled to take a personal grievance under section 27(1)(e) of the *Employment Contracts Act 1991*. It has been suggested that the approach used in duress claims should have been identical to that

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[166] *Employment Contracts Act 1991*, s 30 (a) & (b).
[167] Richardson J stated in *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 that 'undue influence' consisted of 'the gaining of an unfair advantage by an unconscientious use of power by a stronger party against a weaker in the form of some unfair and improper conduct…'. The meaning of undue influence had not been determined in relation to the interpretation of s 30 of the *Employment Contracts Act 1991*. The meaning of undue influence had been determined in relation to the *Labour Relations Act 1987* in *NZ Engine Drivers Etc IUW v Colortron Carpets* Ltd [1989] 1 NZILR 171, as meaning some severity and importing 'something towards coercion, something towards threats'.
[168] For an example of the limitations of intention in this context, see *Parish v Capital Community Newspapers Ltd* [1992] 2 ERNZ 302. This case significantly restricted the right of management employees' right of freedom of association as they had to bear in mind managerial loyalty. See G Anderson, 'Right to strike – managerial employees' [1992] ILB 54 for a critique of this case.
[169] *Hodge v NZ Journalists IUW* [1984] ACJ 625 held that inducement was less than compulsion or coercion and simply meant 'to prevail upon'.
[170] *Employment Contracts Act 1991*, s 30 (c). See also P Cullen 'Non-Unionist's Right to Personal Grievance Procedure Upheld' (1990) NZBB 53–54; P Roth, 'The Legal Future of Employee Representation', (1997) 22 NZJIR 96; G Anderson, 'The Employment Contracts Act: An Employer's Charter?' (1991) 16 NZJIR 147; and J Hughes, 'Protecting the Job Delegate' (1979) 4 OLR 380.
[171] J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 10.3; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC30.05.

which applied in discrimination cases, particularly with reference to the burden and standard of proof.[172]

2.4 PERSONAL GRIEVANCE PROCEDURE

The *Employment Contracts Act 1991* made significant changes to personal grievance procedures. For the first time, all employees covered by employment contracts, irrespective of union membership, had access to the personal grievance machinery.[173] The mediation function was retained as part of a new Employment Tribunal structure, but a more formal process for adjudicating personal grievances, disputes and other employment matters was established.[174]

2.4.1 LEGISLATIVE REQUIREMENTS ON LODGING A PERSONAL GRIEVANCE

The legislative requirements for employees wishing to lodge a personal grievance were specified in the First Schedule to the *Employment Contracts Act 1991*. The Act provided that personal grievance procedures must be included in all employment contracts. If they were not included, the applicable procedure was deemed identical to the procedure

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[172] See J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 10.2–10.7; *Mazengarb's Employment Law* (1999) 30–30.3; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC30.04–EC30.05 for a discussion of duress.

[173] *Employment Contracts Act 1991*, s 33(1). *Employment Contracts Act 1991*, s 2 defined a 'collective employment contract' as 'an employment contract that is binding on one or more employers and 2 or more employees'. 'Individual employment contract' means 'an employment contract that is binding on only one employer and one employee'.

[174] *Employment Contracts Act 1991*, ss 76–79. See also N Taylor 'Alternative Grievance Procedures' (1998) 4 ELB 61–84.

outlined in the First Schedule of the *Employment Contracts Act 1991*.[175] The First Schedule provided standard clauses in relation to procedure for settlement of personal grievances.[176] The provisions read as follows:

> 1. **Settlement of personal grievance:** A personal grievance of any employee bound by this contract shall be settled in accordance with the procedure set out in clauses... to... of this contract.
>
> 2. **Submission of grievance to employer:** Any employee who considers that he or she has grounds for a personal grievance may submit the grievance to the employer or a representative of the employer.
>
> 3. **Time within which personal grievance must be submitted:**
>
> (1) The grievance shall be submitted within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance has occurred or has come to the notice of the employee, whichever is the later, so as to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin.
>
> (2) If the grievance is not submitted within the period prescribed by sub clause (1) of this clause, the employer shall not be obliged to consider the employee's grievance, unless the Tribunal grants the employee leave to submit the personal grievance after the expiration of that period. If the Tribunal grants leave or if the employer consents to the personal grievance being submitted after the expiration of that period, the employer and employee shall be required to comply with the provisions below.
>
> 4. **Employee's written statement:** if the grievance is not settled in discussions between the employee and the employer, the employee shall promptly give to the employer a written statement setting out-
>
> (a) The nature of the grievance; and
>
> (b) The facts giving rise to the grievance; and
>
> (c) The remedy sought.
>
> 5. **Employer's response:** If the employer is not prepared to grant the remedy sought, and the parties have not otherwise settled the grievance, the employer shall as soon as possible, but in any event, not later than the 14th day after the day on which the employer receives the employee's written statement, give to the employee a written response setting out-
>
> (a) The employer's view of the facts; and
>
> (b) The reasons why the employer is not prepared to grant the remedy sought.
>
> 6. **Written statements waived:** Where the employee and the employer agree in writing to waive the requirement for an exchange of written statements, that agreement shall not in any way affect the further application of this procedure.
>
> Power to refer personal grievance to Tribunal-if:

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[175] *Employment Contracts Act 1991*, s 32.

[176] For discussion on alternative procedures, see below Section 2.4.6.

(a) The employee is not satisfied with the employer's written response; or
(b) The employer fails to provide, within 14 days after the day on which the employer receives the employee's written statement, a written response; or
(c) The employer and employee have agreed to waive the requirement for an exchange of written statements and the employee is not satisfied with the employer's response to the grievance, the employee may refer the grievance to the Tribunal in the prescribed manner.

Role of Tribunal: the Tribunal shall, as soon as practicable, where appropriate, (a) provide mediation assistance to the parties; and (b) if necessary, proceed to adjudicate on the grievance and, in doing so, shall consider –
(i) The employee's written statement (if any); and
(ii) The employer's written response (if any); and
(iii) Any evidence or submissions given by or on behalf of the parties; and
(iv) Such other matters as the Tribunal thinks fit.

The *Employment Tribunal Regulations 1991* provided further requirements for the lodging of personal grievances.[177] The next section of this chapter will consider key elements in the personal grievance procedure.

2.4.1(a) 'Submission' of the Personal Grievance

Whether or not there had been a 'submission' of a personal grievance to the employer depended on the facts in each case. Case law indicated the term 'submit' was to be interpreted in a 'liberal' manner.[178] However, the Employment Court has held that where an employee's representative contacted the employer to request reinstatement within the 90-day time limit, this did not constitute submission of a grievance.[179] Finnigan J, in

[177] See below Section 2.4.1(a)
[178] *NZ Harbour Workers Union v Auckland Harbour Board* [1991] 2 ERNZ 200, 213. See also P Roth, 'The Grievance Procedure' in J Hughes, P Roth, G Anderson (eds), *Personal Grievances*, (May 1996) 2.7 for a discussion on the meaning of 'submission'.
[179] *McCarthy v Lydiard Shoe Company Ltd*, unreported, Finnigan J, 25 November 1994, AEC 70/94.

McCarthy v Lydiard Shoe Company Ltd also gave the following view of the term 'submission':[180]

> So little is required. Yet, I do not think that any reasonable consideration of the evidence can yield a confident finding that, within 90 days of the dismissal, the employer was or ought to have been aware that [the employee] felt a sense of grievance. I am prepared to hold that it had been made aware within that period that he was upset and unhappy about the loss of his job and wanted it back. There must… be some positive indication to the employer… that the employee has a "grievance" in terms of s 27 of the Act. To be made aware that a former employee has been shaken by his dismissal and wants his job back is not necessarily to know that the employee has a grievance about his dismissal, which he wants remedied.

The Employment Court also stated that 'submit' meant, 'to present for consideration or decision'.[181] Further, the requesting in writing of the reasons for a dismissal[182] did not in itself constitute a submission of a personal grievance.[183] For the purposes of s 33(2) of the *Employment Contracts Act 1991*[184] the totality of communications could constitute the submission of a personal grievance.[185]

The Employment Court in *Goodall v Marigny (NZ) Limited* also considered whether there had been a proper submission of a personal grievance.[186] Here, Travis J outlined what constituted submission of a personal grievance. He suggested that in determining whether submission had occurred, the correct test was 'whether to an objective observer

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[180] Ibid.
[181] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 511.
[182] Pursuant to *Employment Contracts Act 1991*, s 38.
[183] *Houston v Barker (t/a Salon Gaynor)* [1992] 3 ERNZ 469.
[184] This Section required all employees wishing to submit a personal grievance to the employer to do so within 90 days of the grievance arising.
[185] *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958.
[186] Unreported, Travis J, 11 August 2000, AEC 131/99.

the communication was sufficient… to enable the employer to remedy the grievance, or for the parties to settle it in discussions'.[187]

2.4.1(B) IDENTIFICATION OF EMPLOYER

A significant issue for employees submitting a personal grievance was to correctly identify the actual employer as the relevant legal respondent.[188] The burden of proving the identity of the employer rested with the employee.[189] An inaccurate citing of an employer could sometimes be resolved by instigating a 'joinder' of the correct employer.[190] If the personal grievance was lodged incorrectly with a third party due to an employer action, equity and good conscience could have required the employer to be stopped from a claim that the submission was made outside the 90-day time limit.[191]

If there was a legitimate change of employer, it was essential to identify the correct respondent.[192] An existing employment contract did not automatically transfer to a new employer.[193] A change of employer had to be established by the creation of a new

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[187] *Goodall v Marigny (NZ) Limited*, unreported, Travis J, 11 August 2000, AEC 131/99, 10.
[188] J Hughes, P Roth, G Anderson (eds), *Personal Grievances* (1999) 2.8; *Mazengarb's Employment Law* (1999) III.14; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC32.07.
[189] *Service Workers of Aotearoa v Chan* [1991] 3 ERNZ 15; *Kruesi v Hamua Holdings Ltd* [1992] 3 ERNZ 135.
[190] *Colbert and Fidelity Real Estate Ltd v Employment Tribunal and Anderson,* unreported, Goddard CJ, WEC 16/93.
[191] *For Ever Living Ltd v Kruesi* [1993] 2 ERNZ 636.
[192] *Waller v Collin Schultz and Lynne Johansen (t/a Kiwi Hot Bread Shop)*, unreported, N M Crutchley, 31 October 1994, WT 197/94.
[193] *Wellington etc Local Bodies' Officers' IUOW v Fielding Borough Council* [1983] ACJ 629. See also J Hughes, P Roth and G Anderson (eds), *Personal Grievances* (1999) 2.8; *Mazengarb's Employment Law*

employment contract or by the new employer agreeing to be bound by an existing contract.[194] Consent of the employee to a transfer from one employer to another, could sometimes have been implied.[195]

2.4.1(c) 90-DAY RULE

The *Employment Contracts Act 1991* required an employee, who alleged that she/he had a personal grievance, to notify the employer or the employer's representative no later than either 90 days after the alleged action occurred or when it came to the notice of the employee.[196] In *Robertson v IHC NZ Inc,* it was held that the 90-day time period commenced when the employee 'could reasonably have realised' that she/he had been unjustifiably dismissed.[197]

Under previous legislation covering personal grievance procedures, including the *Industrial Relations Act 1973* and the *Labour Relations Act 1987,* there was no specified

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(1999) III.14 P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC32.05.

[194] *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1, 15. See also *Walker v Aiken* [1993] 2 ERNZ 240 and *Rasch v Wellington City Council* [1994] 1 ERNZ 367. J Hughes, P Roth and G Anderson (eds), *Personal Grievances* (1999) 2.8; *Mazengarb's Employment Law* (1999) III.14; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC32.05.

[195] *Smith v Blandford Gee Cementation Co Ltd* [1970] 3 All ER 154.

[196] *Employment Contracts Act 1991*, s 33(2). See also *Employment Contracts Act 1991*, sch 1, cl 3.

[197] *Fiona Judith Robertson v IHC New Zealand Incorporated*, unreported, Palmer J, 18 March 1999, CEC 55/98. Note that this could result in the 90-day time period commencing at a later date than that on which the actual dismissal occurred.

time limit as to when a personal grievance had to be notified, except that it be submitted 'as soon as practicable'.[198]

The purpose of the 90-day rule under the *Employment Contracts Act 1991* was to ensure that personal grievances were dealt with as close to the point of origin and as quickly as possible.[199] Palmer J, in *Houston v Barker (t/a Salon Gaynor)*[200] made it clear that disadvantage or serious disadvantage could result if a case was delayed. In *Neonakis v Greek Orthodox Community of Wellington & Suburbs (Inc),*[201] Travis J held that it was an essential element of the legislation to make sure that personal grievances were resolved promptly. The rationale was to ensure issues were dealt with in good time whilst still 'fresh in the minds' of the parties.

The matter of when a dismissal or other personal grievance occurred largely depended on the circumstances of the case. In a case of dismissal on notice, it was the date on which contractual employment ceased and not the date of giving notice.[202] In a constructive

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[198] *Labour Relations Act 1987*, sch 7, cl 2.

[199] See [1991] 524 NZPD 1437. However, the Act also permitted an application to be made after the expiration of the 90-day time period, if the parties agreed (s 33(3)), or if the Employment Tribunal was satisfied that the delay was due to the existence of exceptional circumstances, and that it was just to do so (s 33(4)). For further discussion on exceptional circumstances, see *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA).

[200] [1992] 2 ERNZ 469, 482, followed in *McClutchie v Landcorp Farming Ltd* [1993] 1 ERNZ 388, 397, Finnigan J.

[201] [1992] 2 ERNZ 494.

[202] *NZ Seamens Union V Gearbulk Shipping (NZ) Ltd* [1989] 2 NZILR 270, 282. This contrasts with the decision in *Robertson v IHC NZ Inc*, unreported, Palmer J, 18 March 1999, CEC 55/98 where dismissal occurred from the date on which the employee could reasonably have realised that she or he had been unjustifiably dismissed.

dismissal, the same principles regarding the commencement of the 90-day period applied.[203] In cases of summary dismissal without notice, the 90-day time period ran from the date the employment relationship terminated.[204] Where payment had been made to the employee in lieu of notice, but the intention was to dismiss the employee immediately, the 90-day period commenced on the last day the employee worked.[205] In *Poverty Bay Electric Power Board v Atkinson*,[206] it was held that, as the employee was given the opportunity of working through a notice period, dismissal would be effective from the expiry period of the notice. Consequently, this was not a true 'summary' dismissal.

Sections 33(3) and (4) and the First Schedule of the *Employment Contracts Act 1991* all outline various circumstances where the lodgement of a personal grievance was permissible after the expiry of the 90-day limit.

Section 33(3) provided that where the employer did not consent to the personal grievance being submitted after 90 days, the employee could apply to the Employment Tribunal for leave to make an application out of time. Subsection (4) of the same section provided that where an application was made under subsection (3), the Tribunal was required to be satisfied that exceptional circumstances existed. For the rule to be set aside and for leave

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[203] *Charlton v Colonial Homes Ltd*, unreported, Colgan J, 12 August 1994, CEC 29/94.
[204] *GFW Agri-Products v Gibson* [1994] 2 ERNZ 309, 315.
[205] Ibid.
[206] [1992] 3 ERNZ 413.

to be granted, 'an applicant must have shown exceptional circumstances having a causative effect upon the delay in submitting the grievance'.[207]

Poor legal advice,[208] negligence,[209] or illness of the employee's representative,[210] were all held to constitute exceptional circumstances excusing delay in submitting a personal grievance to the employer. In *MacDonald v Health Technology Ltd*,[211] Travis J indicated 'exceptional circumstances' should be given a liberal interpretation. He said that 'exceptional' meant exceptional in the particular case and not necessarily a generally held view of what exceptional circumstances are. However, this approach was later overruled by the Court of Appeal in *GFW Agri-Products Ltd v Gibson*,[212] where it was held that the exceptional circumstances provision could not be established by adopting principles of equity and good conscience.[213] The Court of Appeal indicated the legislative rules should be applied very strictly, and that the burden of establishing exceptional circumstances be a heavy one.[214]

The Court of Appeal later applied the 'strict' approach in *Wilkins & Field v Fortune*,[215] where it was held that the conduct of the parties, namely the employee's belief that a

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[207] *Charlton v Colonial Homes Ltd*, unreported, Colgan J, 12 August 1994, CEC 29/94, 7.
[208] *Transtec (A Trading Division of Railfleet) v Pona* [1993] 1 ERNZ 169.
[209] *Jack v Alliance Group Ltd*, unreported, Palmer J, 20 August 1997, CEC 24/97.
[210] *Japanese Auto Spares Ltd v Harper* [1994] 2 ERNZ 165.
[211] *MacDonald v Health Technology Ltd* [1992] 2 ERNZ 735.
[212] [1995] 2 ERNZ 323.
[213] Ibid 330.
[214] Ibid.
[215] *Wilkins & Field v Fortune* [1998] 2 ERNZ 70.

personal grievance had been submitted and the employer's failure to warn that the information provided was insufficient for the submission of personal grievance, did not amount to exceptional circumstances.

The Employment Court had also indicated that post-90 day events might not constitute exceptional circumstances. In *Rusk and Finch Ltd v Vanderwaal*, Goddard CJ emphasised the need to establish a causal link between the circumstances, and the delay itself and further noted 'few circumstances, however exceptional, are causative of a failure to submit a grievance in time'.[216]

In a personal grievance alleging an unjustified action, the disadvantage had to be 'prospective', and it was not always necessary for the action to be implemented before the personal grievance was lodged. If for example, an employee was given notice that a dismissal will occur, the employee could take an unjustified action personal grievance before the employment relationship terminated.[217]

If the conduct complained of comprised a series of events, the 90-day period ran from the most recent incident, rather than when the behaviour complained of first occurred.[218] In

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[216] *Rusk and Finch Ltd v Vanderwaal*, unreported, Goddard CJ, 13 August 1996, WEC 48/96.
[217] J Hughes, P Roth, G Anderson (eds), *Personal Grievances* (1999) 2.6; *Mazengarb's Employment Law* (1999) III.16; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC32.05.
[218] Ibid. See also *Bloomfield v Kentucky Fried Chicken Ltd* [1991] 3 ERNZ 456, 463.

Minister of Education v Bailey,[219] a distinction was made between disadvantaging acts and the consequences of the actions complained of. A distinction was also made in this case between a disadvantaging act and continuing acts, which resulted in disadvantage.[220] In some cases, the cumulative effect of a series of events was in itself the action complained of.[221]

2.4.1(D) STATEMENTS OF PARTIES

If the employee's personal grievance was not resolved by discussion[222] with the employer or their representative, the employee was required to promptly[223] submit a written statement outlining the nature of the personal grievance, the facts that gave rise to the personal grievance, and the remedies sought to the employer.[224]

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[219] *Minister of Education v Bailey* [1992] 1 ERNZ 948.
[220] Ibid.
[221] C French and P Tremewan, *Employment Law Update,* New Zealand Law Society Seminar, November/December 1994, 28–29.
[222] *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513, 525 where Goddard CJ stated: 'A discussion is the act of seeking, receiving, imparting, and exchanging information opinions and ideas. It may take any form. To limit this to oral discussion would exclude communication with deaf employees and those who have little or no English. Any other restriction would be just as artificial and just as calculated to operate to the detriment of some already disadvantaged group of employees'.
[223] In determining the meaning of 'promptly', Callander J stated in *Northern Hotel, Restaurant etc IUOW v Sagle Holdings Ltd* [1986] ACJ 328, 329 that 'a claim may be dismissed for delay if: 1) the delay is prolonged and inordinate; and 2) no credible explanation for the delay is given; and 3) the defendant has not contributed to or acquiesced in the delay; and 4) the delay will give rise to a substantial risk that a fair hearing will be impossible; or 5) the delay has caused or will be likely to cause serious prejudice to the defendant'. This rule was followed in *Smith v Eastbay Health Ltd*, unreported, HT16/97. In applying this principle the Employment Tribunal decided to use its principle of acting in equity and good conscience: *Employment Contracts Act 1991*, s 79(2); *McLay v Financial Strategies NZ Ltd*, unreported, CT 61/96.
[224] *Employment Contracts Act 1991*, sch 1, cl 4.

Failure to provide a written statement meant that if the provisions of the First Schedule were to be applied strictly, then the provisions of s 140 which gave the Employment Tribunal the right to amend or waive any defect of the proceedings would be inoperative, as the use of discretion to be flexible could not apply.[225] In later cases, the Employment Tribunal took the stricter approach. However it was not intended that this should restrict the principal of flexibility and fairness.[226] The Employment Court stated that the Tribunal should not be quick to deprive personal grievants of the chance to follow their claims purely on the basis of errors in the procedure used.[227]

If the matter was not settled by discussion or the employer was unwilling to provide the remedies sought, the employer was obliged to provide the employee with a written response to the written statement of personal grievance within 14 days of receipt of the written statement of personal grievance.[228] The employer's response should have contained the employer's view of the facts and the reasons why the employer was unwilling to provide the requested remedies.[229]

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[225] *Bloomfield v Kentucky Fried Chicken Ltd* [1991] 3 ERNZ 456, 460–461; *Curran v Ancor Products Ltd*, unreported, HT 66/98.
[226] *Financial Strategies NZ Ltd v Mclay*, unreported, CT 113/95. See J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 2.13.
[227] *McHale v The Open Polytechnic of NZ* [1993] 1 ERNZ 186; *Allan v Whangarei District Council* [1993] 2 ERNZ 567.
[228] *Employment Contracts Act 1991*, sch 1, cl 5. Under cl 6 of sch 1 to the Act, the parties could agree in writing to waive the requirement to have an exchange of written statements. Such a written agreement would not affect any further application of the grievance procedure.
[229] Ibid, cl 5.

Wilful failure to comply with the requisite personal grievance procedure could result in an action for breach of the employment contract under s 52 of the *Employment Contracts Act 1991*[230] or a compliance order.[231] If the parties were then unable to settle the personal grievance, the employee could refer the matter to the Employment Tribunal.[232]

2.4.1(E) APPLICATION TO THE EMPLOYMENT TRIBUNAL

If the employee wished to pursue the personal grievance, it could be referred to the Employment Tribunal under Clause 7 of the First Schedule to the *Employment Contracts Act 1991*.[233] An employee wishing to commence proceedings in a personal grievance had two options: they could either file an application for mediation assistance,[234] or could file the relevant documentation for commencement of adjudication proceedings.[235]

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[230] *Jennings v The Spa and Pool Factory Ltd*, unreported, R A Monaghan, 14 March 1997, AT 133/97. See also, P Roth, 'The Grievance Procedure' in J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 2.14.

[231] See *Sampson v Nelson Lifecare Centre Ltd*, unreported, D E Hurley, 28 September 1995, WT 123/95.

[232] *Employment Contracts Act 1991*, First Schedule, cl 7. Once an employee became aware of a personal grievance and they had complied with the 90-day rule she/he was then required to lodge the relevant form and papers with the Employment Tribunal, *Employment Tribunal Regulations 1991*, SR 1991/227/4. See below, Section 2.4.3, for a detailed description of Employment Tribunal procedure.

[233] If (a) the employee was not satisfied with the employer's written response; or (b) the employer failed to provide, within 14 days after the day on which the employer received the employee's written statement, a written response; or (c) the employer and employee had agreed to waive the requirement for an exchange of written statements and the employee was not satisfied with the employer's response to the grievance – the employee may have referred the grievance to the Tribunal in the prescribed manner.

[234] *Employment Tribunal Regulations 1991*, SR 1991/227/5.

[235] Ibid, SR 1991/227/9. Regulation 4 required the applicant to lodge an application either for mediation or adjudication assistance. Regulation 5 required that the application be submitted on two copies of an authorised form accompanied by a brief description of the grievance to be mediated. The application was to be accompanied by the requisite fee. The Third Schedule and Regulation 53 provided that: (1) The filing fee for application for mediation assistance of $35 had to be submitted; (2) The filing fee for notice of referral of a personal grievance to the Employment Tribunal was $35; (3) Adjudication hearing fee for each half-day or part thereof after the first day was $75. The filing fees for mediation and adjudication were increased under the *Employment Court and Employment Tribunal (Fees) Regulations 1997*. Under these regulations the filing application for mediation assistance, filing notice of referral of personal grievance to

The Employment Tribunal had the authority to both mediate and adjudicate in personal grievance actions. Regulation 6 of the *Employment Tribunal Regulations 1991* required that the Tribunal provide the parties with notice of its decision to conduct mediation.[236] Even if mediation was requested at first instance, the Tribunal could decide to adjudicate the matter[237] and the Tribunal Secretary provided the parties with written notice of its intention to adjudicate on the requisite form.[238]

Regulation 10 also gave the Employment Tribunal authority to mediate in the first instance notwithstanding that the personal grievance had been referred for adjudication.[239] In some cases, the parties could refuse mediation as, under the Act, mediation was not compulsory. In these cases the matter could be adjudicated at first instance.[240]

2.4.2 MEDIATION

Once the parties agreed to attend mediation, the detail of the procedure to be followed by a mediator was not included in either legislation or delegated legislation.[241] The Chief of the Tribunal advised that the detail of how mediation was to be conducted was a matter to

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the Employment Tribunal and adjudication hearing fee, for each half-day or part thereof after the first day, was increased to $70, $70 and $150 respectively.

[236] *Employment Tribunal Regulations 1991*, SR 1991/227/6.

[237] Ibid, SR 1991/227/7.

[238] Ibid.

[239] Ibid.

[240] Ibid.

[241] See W Grills, 'Dispute Resolution in the Employment in the Employment Tribunal; Part One: Mediation' (1992) 17 NZJIR 333.

be determined by the mediator involved.[242] However, absolute privilege was attached to all statements made in the course of submitting a personal grievance.[243]

A key function of the Employment Tribunal was to offer mediation assistance to enable parties to settle disputes voluntarily.[244] Either party, under s 80 of the *Employment Contracts Act 1991*, could make an application for mediation assistance. Subsection (2) of the above section provided that if a party made application for adjudication, an officer of the Tribunal was in a position to determine whether or not mediation should be provided as a means of settling the issue. Subsection (3) provided that even if an officer of the Tribunal had not set down a matter for mediation and referred the matter to adjudication, a Tribunal member could decide that mediation should be offered. However, both parties were required to consent to mediation.[245]

An employee was required, when submitting an application for adjudication, to state if it was possible for the matter to be settled by mediation.[246] Likewise, the employer, in their notice of intention to defend, was required to state whether the matter could be resolved

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[242] Telephone discussion between the writer and Alastair Dumbleton, Chief of the Employment Tribunal, July 1998.
[243] *Employment Contracts Act 1991*, ss 37 and 88(7). Contra *Crummer v Benchmark Building Supplies Ltd*, unreported, Goddard CJ, Travis, Shaw JJ, 11 October 1999, WC 28/00 where an inconsistent statement made in mediation was held to not attract privilege.
[244] See R Gardiner, 'Personal Grievance Mediation in the Employment Tribunal' (1993) 18 NZJIR 342.
[245] See C Baylis, 'The Appropriateness of Conciliation/Mediation for Sexual Harassment Complaints in New Zealand' (1997) 27 VUWLR 585–620.
[246] *Employment Tribunal Regulations 1991*, SR 1991/227/27(1)(b)(vii).

by mediation.[247] If parties later considered that mediation was a suitable option, the Tribunal was able to accommodate this request.[248] Mediation was not required as a prerequisite to the case being adjudicated.[249]

If the case was resolved by mediation, the settlement could be enforced if necessary by a compliance order.[250] There was no right of appeal from a mediated agreement.[251] If a party believed that there was a flaw in the settlement, the only remedy was a common law action under general contract law or by judicial review.[252]

If the personal grievance was not resolved at mediation, the same Employment Tribunal member could not adjudicate the personal grievance, and a fresh adjudicator had to be appointed to hear the case.[253] Members of the Employment Tribunal were appointed as either mediators, adjudicators or carried a dual warrant.[254]

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[247] *Employment Tribunal Regulations 1991*, SR 1991/227/28(a).
[248] *Employment Contracts Act 1991*, ss 78, 79(1)(a). See also *Employment Tribunal Regulations 1991*, SR 1991/227/10.
[249] *Employment Contracts Act 1991*, s 78(6).
[250] *Tucker v Cerissi Leather Ltd* [1995] 2 ERNZ 11.
[251] *Wilson v Serco Group (NZ) Ltd* [1992] 2 ERNZ 133.
[252] P Roth, 'The Grievance Procedure' in J Hughes, P Roth and G Anderson (eds), *Personal Grievances* (1999) 2.20.
[253] *Employment Contracts Act 1991*, s 81(5).
[254] Ibid, s 81(4).

Roth indicated that in contrast to adjudication, mediation was quicker, cheaper, less stressful, and more effective due to the voluntary nature of settlement.[255] As mediation was held in private, the parties were protected from public disclosure of information.[256] It was also suggested that even if a personal grievance was not resolved at mediation, the procedure itself was of value to the participants as it helped identify outstanding issues and concerns.[257]

2.4.3 ADJUDICATION PROCEDURE

2.4.3(A) STATEMENT OF CLAIM

For the personal grievance procedure to proceed, the applicant was required to lodge with the Employment Tribunal a statement of claim under the *Employment Tribunal Regulations 1991*.[258] The importance of the requirement to lodge a statement of claim was stated by Goddard CJ to be:[259]

> They are there to inform the opposite party of the nature of the case that will be advanced against him, her, or it, and also to inform the Tribunal of the nature of the case with some degree of

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[255] P Roth, 'The Grievance Procedure' in J Hughes, P Roth and G Anderson (eds), *Personal Grievances* (1999) 2.20.
[256] Ibid.
[257] Ibid. See also W Grills, 'Dispute Resolution in the Employment Tribunal, Part One: Mediation' (1992) 17 NZJIR 333, and R Gardiner, 'Personal Grievance Mediation in the Employment Tribunal' (1993) 18 NZJIR 342 for a further discussion on the benefits of mediation.
[258] *Employment Tribunal Regulations 1991*, SR 1991/227/27 provided which form the statement of claim had to be made on and said which matters needed to be included in a statement of claim. These were: the general nature of the claim; the facts of the case (not including evidence of the facts); reference to relevant parts of the employment contract which was relied on; reference to any relevant legislation or delegated legislation; remedies sought and details of how the claim was calculated; any claim for interest; whether or not the applicant believed the matter could have been settled by mediation.
[259] *Z v A* [1993] 2 ERNZ 469, 491. See *Employment Tribunal Regulations 1991* SR1991/227/27(3).

> precision so that it will be able to follow it and to confine its consideration of the material to the matters signalled in advance by the parties as being relevant.

It was possible to amend statements of claim; it was necessary that the amended statement of claim be accurately identified as such to avoid confusion.[260] If an amendment was made close to the date of hearing, it was possible for the other party to seek an adjournment to facilitate consideration of the amended statement of claim. This could have caused problems in terms of costs and delay in the process.[261]

2.4.3(B) STATEMENT OF DEFENCE

Regulation 28 of the *Employment Tribunal Regulations 1991* required an employer who intended to defend a claim of personal grievance to lodge an 'intention to defend' form with the Employment Tribunal.[262]

Regulation 29(1) of the *Employment Tribunal Regulations 1991* provided that on application to the Tribunal by the applicant, the Tribunal could direct the respondent to lodge with the Tribunal a statement of defence.[263] Normally, an employer was not

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[260] J Hughes, P Roth, G Anderson, (eds), *Personal Grievances* (1999) 2.17; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) ECR25.05.
[261] Ibid.
[262] *Employment Tribunal Regulations 1991*, SR 1991/227/28. This clause provided that an employer who intended to defend was obliged to lodge a statement of intention to defend with the Employment Tribunal and with the applicant within 10 clear days after the date of service of the statement of claim on the respondent. This provision was subject to any instruction given by the Employment Tribunal.
[263] *Employment Tribunal Regulations 1991*, SR 1991/227/29, provided that every application should be in form 14, should be considered on the papers and be granted only if the Tribunal in its discretion so decided. Except if the Tribunal consented, no application to require the respondent to lodge a statement of defence could be brought within 14 days of the date of the hearing. At any time prior to the hearing the Tribunal could direct the respondent to lodge a statement of defence, except in cases where mediation was being sought.

required to provide a written statement of defence; the provisions in clause 5 of the First Schedule to the *Employment Contracts Act 1991* would have been accepted as a de facto statement of defence.[264]

If the applicant was unclear as to the grounds on which the respondent intended to defend the statement of claim, then the Employment Tribunal could order that a statement of defence be submitted. For example, an employer may have failed to provide a written statement in response to a letter of personal grievance or reasons for dismissal.[265] The *Employment Tribunal Regulations* detailed the information to be contained in a statement of defence should one have been required.[266] An amended statement of defence was possible if it was in the interests of justice to permit it.[267] If the respondent failed to provide a statement of defence when ordered to do so by the Employment Tribunal under

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[264] See J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 2.19; *Mazengarb's Employment Law* (2000) 32.9; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) ETR 29–32.

[265] *Youens v Verikiwi Pak Ltd*, unreported, AT 375/96. Another possible reason for a written statement of defence to be required by the Tribunal was if the written statement or reasons for dismissal provided insufficient information: *Beven v Airco Service Ltd* unreported, CT 129/98.

[266] *Employment Tribunal Regulations 1991,* SR 1991/227/32. It was required that statements of defence should be in form 5; specify in numbered paragraphs whether the respondent admitted or denied each allegation of fact; where the respondent had a positive defence the details of it; and whether or not the respondent believed that the proceedings could have been resolved by mediation. The details of a positive defence included the general nature of the defence, the facts but not the evidence of the facts on which the defence was based, reference to the employment contract and any particular clauses which were relied upon, and references to any relevant legislation including relevant sections or regulations. Every admission or denial was not to be evasive but substantively answer the point.

[267] *Northern Hotel Etc IUOW v Dengli (T/A Smales Road LunchBar)* [1991] 3 ERNZ 42. Here, Colgan J held that an amended statement of defence could not be permitted at an advanced stage in the proceedings. In this case, parties had already completed the examination in chief and a completely new ground of defence was sought to be introduced by way of cross-examination of the witness.

Regulation 29, the proceedings could only be defended by leave of the Employment Tribunal.[268]

2.4.3(c) Adjudication Hearing

Irrespective of an application for mediation, the Employment Tribunal could notify the parties of its intention to adjudicate. Regulation 8 required the Secretary of the Tribunal to notify the parties of details of adjudication on the prescribed form on receipt of the appropriate fee and all relevant documentation.[269] Regulation 9 provided detailed procedures on how personal grievances were to be referred to the Employment Tribunal for adjudication and outlined the relevant fee, statement of claim forms, and other relevant matters.[270]

Section 88(7) of the *Employment Contracts Act 1991* required that all adjudication procedures be recorded.[271] Regulation 49(1) of the *Employment Tribunal Regulations 1991* provided for the manner in which adjudication hearings were to be conducted. Regulation 49 provided that: all evidence was to be heard under oath; each witness could give his or her evidence-in-chief by reading or confirming a written brief or statement of evidence; the Tribunal was to hear firstly the evidence of the applicant and all evidence they wished to adduce; the Tribunal then heard the evidence of the respondent and all

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[268] *Employment Tribunal Regulations 1991*, SR 1991/227/29.
[269] Ibid, SR 1991/227/8.
[270] Ibid, SR 1991/227/9.
[271] See also *Employment Tribunal Regulations 1991*, SR 1991/227/47.

evidence they wished to adduce; if the Tribunal was satisfied that evidence presented by the respondent could not have reasonably been foreseen by the applicant, and if that evidence required a reply, the applicant was permitted to adduce evidence in rebuttal; parties could examine, cross-examine and re-examine witnesses; either party could sum up their case; and the Tribunal then considered the matter and dealt with it according to the appropriate legislation.[272] The Tribunal member could intervene or vary the hearing procedure provided it was done in a fair manner.[273] Likewise, the Employment Tribunal had authority to question witnesses, provided it did so in a fair and correct manner.[274]

Goddard CJ in *Davidson v Telecom Central Ltd* [275] indicated adjudication must be fair, but must also be seen to be fair and that ultimately, the parties must determine the matters that the parties wish the Employment Tribunal to decide. Consequently, the adjudicators had to be detached to present a picture of even-handedness. The Chief Judge noted that adjudicators questioning witnesses to satisfy their curiosity as to their credibility, was not

[272] For brief discussion on the shifting burden of proof in personal grievances see above, categories of personal grievances under the *Employment Contracts Act 1991*, Paragraphs 2.3.3(a)–2.3.3(e). See also *Mazengarb's Employment Law* (2000) III.19; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.33.
[273] *Employment Tribunal Regulations 1991*, SR 1991/227/49(2). See also *McHale v The Open Polytechnic of New Zealand* [1993] 1 ERNZ 186, 197–198 where the Employment Court found a claim was struck out in an unfair manner at a preliminary hearing of the Tribunal.
[274] *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819, 838, Goddard CJ referring to *Jones v National Coal Board* [1957] 2 All ER 155, 159, where Lord Denning stated that the 'Judge's part in all this is to hearken to the evidence only himself asking questions of the witnesses when it is necessary to clear up any point that has been overlooked or left obscure'.
[275] [1993] 2 ERNZ 819, 838.

acceptable. Such questions ought to have been dealt with by the cross-examiner, not the adjudicator.[276]

The Employment Tribunal was required to give written reasons for its final decisions.[277] Travis J, in *Smith v Armourguard Security Ltd* [278] provided a list of propositions regarding the Tribunal's obligations. Sections 76(c) and 88(3) of the *Employment Contracts Act 1991* imposed an obligation on the Employment Tribunal to be fair, which Travis J believed made it essential for adjudicators to provide reasons for their decisions to avoid an accusation that a decision was arbitrary.[279] The Employment Tribunal was obliged to indicate the evidence preferred when making its decision; failure to do so could lead to the unsuccessful party feeling aggrieved.[280] Although Travis J pointed out it was not obligatory for adjudicators to provide reasons for their decisions on questions of credibility, it was desirable should the case be appealed, and to provide justification for the decision. Travis J also took the view that it was not an obligation of the Employment Tribunal to give reasons for its decisions when discussing irrelevant or peripheral factual matters.

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[276] *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819, 838. See also *R v Awatere* [1982] 1 NZLR 644, 647 for a detailed discussion on the credibility of witnesses.
[277] *Employment Tribunal Regulations 1991*, SR 1991/227/48.
[278] [1993] 1 ERNZ 446, 455.
[279] See *Smith v Armourguard Security Ltd* [1993] 1 ERNZ 446, 455 for a detailed discussion on the Tribunal's obligations relating to hearing procedure.
[280] Ibid.

2.4.3(D) COSTS

Under section 98 of the *Employment Contracts Act 1991*, the Tribunal had the authority to make an order for the award of costs to any party by another party as was reasonable.[281] The Employment Tribunal had the function of determining the quantum of costs to be awarded. The overarching principle was that costs should follow the event complained of and be awarded in favour of the successful party.[282] The principles to be applied in awarding costs were determined in *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613 where Goddard CJ suggested that a multiplier of 1.5 and 2 should be applied to the hearing time to ascertain the total time of professional participation. A checklist of factors to be applied in determining the quantum of costs was also stipulated in the same case; the checklist was derived from two previous cases that decided the issue.[283] The checklist of factors to be considered was:[284]

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[281] *Employment Contracts Act 1991*, ss 98 and 108.
[282] *Reid v NZ Fire Service Commission* [1995] 2 ERNZ 38, where Goddard CJ commented that s 108 conferred a duty on the Court to do what was right and just. See P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC108.04; *Mazengarb's Employment Law* (2000) 108.3.
[283] *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 943, 954; *Hamilton CC v Waikato Electrical Authority*, unreported, Hammond J, 29 September 1993, HC, CP21/93. See P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (ed), *Employment Contracts* (2000) EC98.04; *Mazengarb's Employment Law* (2000) 98.2.
[284] *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613. A more comprehensive checklist was later adopted in *Reid v NZ Fire Service Commission* [1995] 2 ERNZ 38, where Goddard CJ stated that the guidelines for the discretion of awarding costs were: (i) *Employment Contracts Act 1991*, s 108 was applicable to any proceedings; (ii) The Court had a discretion to award costs and that discretion was to be exercised according to principle and not arbitrarily; (iii) The Court was to award such costs and expenses as reasonable; (iv) In making a decision on costs under s 108, the equity and good conscience jurisdiction was particularly apt; (v) There were no general rules restricting the discretion to award costs; (vi) The purpose of a costs award was not to punish or express disapproval, but rather to compensate a successful party put to expense; (vii) The Court was not bound by scales of costs for the time being in force in the High Court or the Court of Appeal; (viii) Costs should follow the event unless there were special circumstances

1. The manner in which the case was conducted;
2. The conduct of the parties at the hearing;
3. The importance of the case to the parties;
4. The time required for effective preparation;
5. Whether arguments without substance were made or whether unnecessarily technical arguments were used;
6. The actual costs incurred;
7. A costs award should be on the basis of a contribution as opposed to an indemnity.

Once a party to a personal grievance had raised the issue of costs, the Employment Tribunal had two options: firstly to hear issues raised on costs at the substantive hearing, or to reserve the issue of costs to a later hearing. The Tribunal could not decide issues on costs without first having heard the parties.[285] If the Tribunal did not reserve costs in the substantive decision, it had no jurisdiction to hear any question of costs at a later date (*functus officio*).[286] Failure to reserve costs was an appealable error of law: the Employment Court had the authority to refer the matter back to the Tribunal for further consideration.[287]

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indicating it would be fair to depart from the general rule; (ix) The multiplier to calculate total time was approximately between twice to threefold the time spent in Court; (x) Relevant considerations were: the conduct of the parties in unnecessarily adding to the costs incurred; ability to pay without undue hardship; the complexity of the case; whether it was a test case; the length of the hearing; the importance of the case to the parties; the consequences of the result; and the amount of time required for effective preparation. See also P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (1999) EC108.04; *Mazengarb's Employment Law* (2000) 108.3.

[285] *Poverty Bay Electric Power Board v Atkinson* [1882] 3 ERNZ 413.

[286] See P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (1999) EC98.04; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.28. *Functus officio* was the Latin term meaning that (in this case the Employment Tribunal) had discharged its function.

[287] *Ashburton Veterinary Club Inc v McGowan* [1993] 2 ERNZ 581.

Goddard CJ acknowledged the possibility of awarding costs for executive time for staff members in addition to normal costs. In average sized companies a staff member would be able to organise another employee to undertake their work. However, this may not have been possible where the employer was small, hence the possible award of executive time.[288] It was possible for a self represented party to be awarded costs for legal or professional advice sought which permitted them to represent themselves more effectively.[289] It was consistent with the Employment Tribunal's function to operate in a manner of equity and good conscience that a wide view had to be taken of a litigant's expenses, including loss of income and expenses incurred.[290] Under the *Employment Contracts Act 1991,* the Court also held that unions could still be compensated for time spent and any expenses incurred whilst representing their members.[291]

In relation to mediation procedures, the general rule was that attendance costs for this process were not recoverable.[292] It should however be noted that failure to participate in

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[288] *NZ Resident Doctors Association v Otago AHB* [1991] ERNZ 1206; *Open Systems Ltd v Pontifex* [1995] 2 ERNZ 211. See P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (2000) EC98.05; *Mazengarb's Employment Law* (2000) 108.4.
[289] *Health Technology Ltd v McDonalds* [1993] 2 ERNZ 842. See P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (2000) EC98.05; *Mazengarb's Employment Law* (2000) 108.4.
[290] Ibid.
[291] *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ 1043. In this case an order for costs was specifically made to reimburse the union.
[292] *Trotter v Telecom Corporation Ltd* [1993] 2 ERNZ 935; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.21.

the mediation process with an intention to resolve the situation could have had cost implications.[293]

An offer of settlement by one party to the other prior to the actual hearing was called a Calderbank offer.[294] If the party did not accept the offer and was subsequently successful in the hearing, but was awarded a lesser amount in compensation, the party who made the offer could bring this matter to the attention of the Employment Tribunal when costs were being awarded.[295] In *Ogilvy & Mather v Darroch* [296] Goddard CJ stated:[297]

> Once the court has received evidence of the Calderbank offer it can take into account the fact of its making and non-acceptance in the course of the exercise of its discretion. [The effect of a Calderbank offer was] intended to induce the Court to exercise its discretion against granting the plaintiff any costs if it has recovered less by going to the Court than it could have by accepting the offer.

a) Legal Aid

If an unsuccessful party to a personal grievance was in receipt of legal aid, the costs awarded against that party were limited to the amount of the contribution required of

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[293] *Brownless v Tasmin Pulp and Paper Co Ltd* [1993] 1 ERNZ 158; *Open Systems Ltd v Pontifex* [1995] 2 ERNZ 211; Affirmed by the Court of Appeal in *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 where the Court stated, '[g]enerally a party rejecting mediation and failing to achieve significantly more in subsequent litigation must expect costs consequences'; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 2.21; *Mazengarb's Employment Law* (2000) 80.5; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC80.07.

[294] *Calderbank v Calderbank* [1975] 3 All ER 333 (CA). See J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 2.22; *Mazengarb's Employment Law* (2000) 108.5; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC108.12.

[295] Ibid.

[296] [1993] 2 ERNZ 943, 953.

[297] Ibid 944.

them by the Legal Services Board, unless exceptional circumstances existed.[298] If a proportion of costs were not paid due to the operation of the provision in s 86(2) of the *Legal Services Act 1991* the party could apply to the Legal Services Committee to have the balance of the costs met.[299] Therefore the Employment Tribunal had to record the amount of costs that would have been awarded if liability had not been limited by the operation of s 86(2).[300] If the legally aided party was successful, any costs awarded to that party would have been considered by the Legal Aid Committee in assessing the amount that the legally aided party was required to repay.[301]

2.4.3(E) EVIDENCE AND LIMITATIONS ON APPEAL

Section 95(4) of the *Employment Contracts Act 1991* made it extremely difficult to introduce new evidence on appeal. It was only possible to introduce new evidence if the Employment Court was satisfied that the evidence could be relevant to the decision made by the Tribunal and there were either exceptional circumstances or the party could not, by the exercise of reasonable diligence, have placed the evidence before the Tribunal. This was a significant change from previous legislative provisions where appeals were heard

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[298] *Legal Services Act 1991*, s 86(2). See *Mazengarb's Employment Law* (2000) 108.6; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (1999) EC79.18–79.19.
[299] *Legal Services Act 1991*, s 87.
[300] *Mazengarb's Employment Law* (2000) 108.6; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (1999) EC79.19.
[301] Ibid. For a summary of the effect of these provisions see *Legal Services Board v Whangarei District Court* [1998] 3 NZLR 225, 228–229.

de novo.[302] The Court of Appeal stated, that the Employment Court was 'essentially an appellate Court in the true sense'.[303]

If there was an issue under s 95(4) of the *Employment Contracts Act 1991* regarding the admissibility of new evidence, the Court of Appeal recommended that the Employment Court should 'err on the side of liberality', particularly if the issue involved was likely to affect third parties not involved in litigation.[304] However, the Employment Court distinguished the liberality principle and a 'balancing' test imposed.[305]

Further, Section 95(4)(b) of the *Employment Contracts Act 1991* only applied to 'issues, explanations, and facts', which had not been presented at the Tribunal. In *Hill v Cantac Services*,[306] the Employment Court distinguished between new evidence of facts that had already been discussed at the Tribunal and new facts 'per se'.[307] In this case, for example, admitting new evidence of a matter that had already been discussed at the Tribunal was held not to fall within the legislative provision.

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[302] *NZ Baking Trades etc IUOW v Findlays Gold Krust Bakeries Ltd* [1989] 1 NZILR 661.
[303] *TNT Express Worldwide (NZ) Ltd v Cunningham* [1992] 2 ERNZ 1010, 1012.
[304] Ibid 1013.
[305] *Air New Zealand Ltd v Sutherland* [1993] 1 ERNZ 76, where Colgan held that the statutory test of fairness in this context had to be applied to both parties. Hence, in this case admission of some new evidence would have been more unfair to the respondent than fair to the appellant so admission of new evidence was denied. See also *Phoenix Freight Ltd v Hodge* [1995] 1 ERNZ 533; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 2.35; *Mazengarb's Employment Law* (2000) 95.6.
[306] *Hill v Cantac Services* [1992] 3 ERNZ 844, 847.
[307] Ibid.

However, Colgan J in *Kissack v United Airlines Incorporated*,[308] distinguished *Hill* by indicating that the evidence which was attempted to be adduced on appeal could by reasonable diligence have been obtained prior to the Employment Tribunal hearing. The requirement of acting with 'reasonable diligence' was said to depend on the facts of each case.[309]

Examining s 95(4)(b)(ii)(B) of the *Employment Contracts Act 1991*, Goddard CJ in *TNT Express Worldwide (NZ) Ltd v Cunningham*,[310] indicated that there was no real point in attempting to provide an exhaustive definition of 'exceptional circumstances' and that exceptional circumstances should be determined in each individual case, thus avoiding 'judicial exposition'.[311]

Appeal was possible from the Employment Court to the Court of Appeal in personal grievance cases only on the ground that the decision being appealed was 'erroneous in

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[308] *Kissack v United Airlines Incorporated*, Unreported, Colgan J, 27 August 1993, AEC 44/93.
[309] Ibid. See also *Flight Attendants and Related Services Assn Inc v Air New Zealand*, unreported, Colgan J, 24 February 1995, AEC 7/95.
[310] [1992] 2 ERNZ 694, 700.
[311] Ibid. See also P Roth, 'The Grievance Procedure' in J Hughes (ed), *Personal Grievances* (1999) 2.35; *Mazengarb's Employment Law* (2000) 95.6; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC95.09 for discussion of 'exceptional circumstances'.

point of law';[312] hence no appeal on facts was available except when no evidence had been presented.[313]

2.4.4 REMEDIES

Sections 40, 41 and 42 of the *Employment Contracts Act 1991* provided remedies to resolve personal grievances.[314] Although the Act gave the Employment Tribunal discretion to award whichever remedies were appropriate, there were guidelines on the allocation of particular remedies.

The Court of Appeal provided guidelines on factors to be considered by the Tribunal when granting reimbursement and compensation,[315] although in doing so the Court of Appeal referred to cases decided under the *Labour Relations Act 1987*. The Court stated that, with the exception of the minimum amount contained in s 41(1) of the Act,[316] the

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[312] *Employment Contracts Act 1991*, s 135(1). See also *Employment Contracts Act 1991* s 136 where the Court of Appeal could refer an appeal back to the Employment Court for reconsideration.
[313] *Port of Wellington v Longwith* [1995] 1 ERNZ 87; *Christchurch City Council v Davidson* [1996] 2 ERNZ 1.
[314] *Employment Contracts Act 1991*, ss 40 and 41 listed the available remedies as follows: reimbursement to the employee of money lost while an employee as a result of the grievance; reinstatement of the employee; payment of compensation to the employee for loss of dignity, humiliation and injury to the feelings of the worker; loss of benefit to the employee whether or not monetary in nature which the worker could have expected to earn had the personal grievance not occurred. In sexual harassment cases, the Tribunal could make a recommendation for settlement of the grievance. See also *Mazengarb's Employment Law* (2000) III.36; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (2002) EC40.04–EC40.08; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.1.
[315] *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275; *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159; and *Minister of Education v Dailey* [1993] 2 ERNZ 321.
[316] The reimbursement awarded was to be the lesser of three months' ordinary time remuneration or the amount of remuneration actually lost.

amount to be awarded by the Tribunal for lost wages or compensation was discretionary. Cooke P indicated in *Telecom South Ltd v Post Office Union*, that:[317]

> In evolving their approach to the exercise of the discretion… the Employment Court must of course act judicially and on the basis of principle. Reasonable consistency is required; established patterns should not be departed from without good and enunciated reasons.

On the amount of compensation to be awarded, Richardson J in the above case stated, 'a just and reasonable award must reflect the circumstances and legitimate interests of both parties'.[318]

2.4.4(A) REIMBURSEMENT

The principle involved in the award of reimbursement was to compensate an employee for lost remuneration as a result of the personal grievance. Section 41 provided for the payment of actual loss of remuneration or three months' wages, whichever was the lesser.[319] Section 41 also provided that the Tribunal had the discretion to award either a greater or lesser amount depending on whether or not the employee was at fault.[320]

In *Trotter v Telecom* [321] Goddard CJ discussed the relationship between Sections 40 and 41 of the *Employment Contracts Act 1991*. Goddard argued that s 40 appeared to be stating that there was discretion whether to award reimbursement, however, he reasoned

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[317] [1992] 1 NZLR 275, 280.
[318] Ibid, at 286. For a detailed discussion on remedies available under the *Employment Contracts Act 1991*, refer to J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.2–11.16.
[319] *Employment Contracts Act 1991*, s41 (1)(b).
[320] *Employment Contracts Act 1991*, s 41 (3)(b).
[321] *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659.

that s 41 made it clear that the discretion should have been applied in the employee's favour. Goddard CJ took the view that while s 41 stated that there was discretion as to the amount to be awarded, there must have been good reason why the full amount of the loss incurred by the employee was not granted. Goddard CJ stated that the legislation provided a minimum to be awarded, and that the discretion related to whether or not the statutory minimum should have been exceeded.[322] In determining whether or not the minimum should have been exceeded, Goddard CJ stated that the following process had to be followed: the first step was to determine whether or not the employee had a personal grievance; if they did, the second step was whether the employee had lost remuneration as a consequence of the personal grievance; the third step was to establish the amount of the loss; fourthly award reimbursement if it was equal to or less than three months ordinary time remuneration; fifthly, if as a result of the personal grievance the loss was more than the statutory minimum, it was then necessary to decide whether or not to award more as compensation to compensate for remuneration lost; sixth, it was then necessary to consider any proved contributory fault by the employee – if contributory fault was proved, it was then necessary to reduce the amount awarded in a just and equitable manner.[323]

[322] Ibid 693.
[323] Ibid 693–4.

In the first instance, the employee had to show that they had suffered loss. Under s 41 of the Act, loss included loss of remuneration in lieu of notice.[324] Loss also included continuing loss if the employee failed to obtain alternative employment or if the employee had obtained new employment at a lower rate of pay than the job lost.[325] Loss in some instances could include loss of other benefits, for example loss of use of a motor vehicle or telephone rental.[326]

Reimbursement of any loss or benefit was dependent on the applicant proving loss of either remuneration or benefits. There was no authority to make an award of reimbursement for loss as a result of a personal grievance if no loss had been sustained.[327] It was held that it was normally safe to assume that the loss sustained was as the result of the personal grievance, unless such an assumption offended the general principles of common sense.[328] The onus to make a link between the personal grievance and the loss rested with the employee, therefore the employee was obliged to attempt to mitigate the loss sustained by finding alternative employment.[329]

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[324] *Atwill v Tanners Timber World Ltd* [1994] 1 ERNZ 321.
[325] *Auckland & Tomoana Freezing Works Etc IUW v South Pacific Meat Corporation Ltd* [1991] 3 ERNZ 1146.
[326] *Atwill v Tanners Timber World Ltd* [1994] 1 ERNZ 321. The contractual basis for these types of benefits had to be established by the employee.
[327] *Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74.
[328] *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659.
[329] *General Motors Ltd v Lilomaiava* [1997] ICJ 109. See also *Schollum v Andrew*, unreported, AEC 45/96.

2.4.4(B) COMPENSATION

Compensation was available to compensate an employee for losses other than lost wages.[330] Section 40 of the Act stated that compensation was available for loss of dignity, humiliation, injury to feelings; and loss of any benefit.[331]

a) Employment Contracts Act 1991*, s 40(1)(c)(i): Humiliation, Loss of Dignity, and Injury to Feelings*

It was intended that the compensation provision for humiliation, loss of dignity, and injury to feelings found in *Employment Contracts Act 1991*, s 40(1)(c)(i) was to provide redress for the employer's actions toward the employee.[332] Several principles were developed in applying this policy:

1. Even if a personal grievance had been established, it was not automatic that an award for compensation would be granted;[333]

2. The relevant criterion applied when determining the amount of compensation to be awarded was the impact of the employer's actions on the employee. The award of compensation to an employee was not to be seen as a punishment of the employer.[334] In relation to determining the impact of the employer's actions on the employee, the employee had to be taken as they were found;[335] also any effect on the employee's whanau/family was not a relevant factor

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[330] *Employment Contracts Act 1991*, s 40, detailed the remedies available in personal grievance cases.
[331] *Employment Contracts Act 1991*, s 40(1)(c)(i) and (ii).
[332] *Mazengarb's Employment Law* (2000) 40.8; See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.17-11.34; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Contracts* (2000) EC40.06 (4).
[333] *Department of Survey and Land Information v NZ Public Service Assn* [1992] 1 ERNZ 851 (CA).
[334] *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (CA); *Lavery v Wellington Area Health* Board [1993] 2 ERNZ 31; *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334; See *Mazengarb's Employment Law* (2000) 40.8; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC40.06; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.18.
[335] *Wellington Etc Shop Employees etc IUW v Pacemaker Transport Wellington Ltd* [1989] 2 NZILR 762, applied in *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971. This was consistent with the decision of the Court of Appeal in *Department of Survey and Land Information v NZPSA* [1992] 1 ERNZ 851, where it was held that each case had to be considered on its facts.

when determining the award of compensation. However, the employee's knowledge of the effect on whanau/family was a legitimate component when assessing loss.[336]

3. The actions of the employer must have caused the loss of dignity and injury to feelings of the employee.[337]

4. The assessment of quantum was not a precise art but a process of applying the principles in like cases to achieve consistency.[338] The quantum awarded was related to the employer and the circumstances in which the grievance took place; the most important consideration was the treatment of the employee in the circumstances leading to the grievance.[339]

5. When deciding the amount to be awarded, it was necessary to take into account the amount of any other remedies awarded.[340]

6. In deciding whether or not an award was favourable, the employer's ability to pay was taken into account.[341]

7. If the employee contributed to the actions complained of, the quantum awarded could be reduced.[342]

8. Unless there had been a legal error, the Court would not alter an award made by the Employment Tribunal, nor would the Court of Appeal disturb an award made by the Employment Court.[343]

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[336] *Air New Zealand v Johnston* [1992] 1 NZLR 159,167; *Tawhiwhirangi v Attorney General* [1994] 1 ERNZ 459.

[337] *Association of Staff in Tertiary Education v Northland Polytechnic Council* [1992] 2 ERNZ 943; *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601; *Rongotai College BOT v Castle* [1998] 2 ERNZ 430. In the latter two cases, the Court of Appeal held that any loss of dignity had to be causally linked to the actions of the employer that caused the grievance. See Mazengarb's *Employment Law* (1999) 40.8; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.30.

[338] *Trotter v Telecom Corp of NZ Ltd* [1993] 2 ERNZ 659; in this case Goddard CJ stated, 'in general the assessment of compensation under Section 40(1)(c)(i) is just that, an assessment. Injury to feelings humiliation and distress are not matters that are capable of arithmetical calculation, exact valuation or close reasoning … it is really a matter of impression'.

[339] Ibid. See *Mazengarb's Employment Law* (1999) 40.8; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.32; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (ed), *Employment Contracts* (2000) EC40.06.

[340] *Trotter v Telecom Corp of NZ Ltd* [1993] 2 ERNZ 659. See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.33; *Mazengarb's Employment Law* (2000) 40.8; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (ed), *Employment Contracts* (2000) EC40.06.

[341] *Trotter v Telecom Corp of NZ Ltd* [1993] 2 ERNZ 659. See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.34.

[342] *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA). Here, it was stated that there was no discretion to order a reduction in quantum, only as to the amount of the reduction. See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.45; *Mazengarb's Employment Law* (2000) 40.10; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (ed), *Employment Contracts* (2000) EC40.07.

b) Employment Contracts Act 1991 *Section 40(1)(c)(ii): Loss of Benefit*

Loss of benefits appeared to have been limited to benefits contained and arising from the terms of the employment contract.[344] It did not appear to have been extended to such items as the cost of securing alternative employment.[345] It was stated by Richardson J in the Court of Appeal that the approach to be taken was similar to the concept of legitimate expectation to a future benefit to which the employee would have become entitled.[346] However, although it was stated that the *Telecom* case was clearly referring to benefits contained in the terms of the employment contract, it could have referred to benefits that were of a more discretionary nature.[347] In general terms reimbursement for loss of benefit meant reimbursement of benefits to which the employee had already become entitled due to service with the employer.[348] However, Richardson J stated that s 40(1)(ii) also related to potential service related benefits which the worker would reasonably be expected to

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[343] *Cain v HL Parker Trusts* [1992] 3 ERNZ 777; See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.43.

[344] *Employment Contracts Act 1991* s 40(1)(c)(ii).

[345] *Meharry v Guardall Arms NZ Ltd* [1991] 3 ERNZ 305; *Mazengarb's Employment Law* (1999) 40.8; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.35; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC40.06.

[346] *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275 Richardson J stated that this was to have related to a prospective future benefit, not one which was currently in existence. Richardson believed that the benefits intended in this paragraph related to future benefits to which the employee would have become entitled had their service not been broken by the actions of the employer. See *Mazengarb's Employment Law* (1999) 40.8; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.35; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC40.06.

[347]*Mazengarb's Employment Law* (1999) 40.8; See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.35–11.43; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC40.06 (5).

[348] *Meharry v Guardall Arms NZ Ltd* [1991] 3 ERNZ 305; *Mazengarb's Employment Law* (1999) 40.8. J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.35; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC40.06.

have obtained had they remained in the service with the same employer.[349] It should be noted that compensation was not limited to those contained in s 40(1)(c) subparagraphs (i) and (ii) thus creating the expectancy of recovery for future benefits to which the employee would have become entitled.[350] In *NZ Meat Processors Union v Alliance Freezing Co (Southland) Ltd* [351] Palmer J awarded compensation under s 40(1)(c)(ii) for 'hidden' financial costs of losing the income to which the employees were entitled to under their contract of employment.

2.4.4(c) REINSTATEMENT

The Tribunal had the authority to order that an employee be reinstated either to their previous position or to a position that was no less advantageous.[352] It was held by the Court of Appeal that it was for the Court to determine, based on fact, whether a position was less advantageous.[353] In contrast to previous legislation reinstatement was no longer the primary remedy. The effect of this was that few employees were reinstated[354] although judicial comment indicated that the ideal approach was towards job security.[355] The

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[349] *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275. *Mazengarb's Employment Law* (1999) 40.8; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.35; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC40.06.
[350] *Mazengarb's Employment Law* (1999) 40.8; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.35; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC40.06.
[351] [1989] 2 NZILR 256.
[352] *Employment Contracts Act 1991*, s 40(1)(b).
[353] *Air New Zealand Ltd v Johnston* (No 2) [1992] 1 ERNZ 700.
[354] J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.8.
[355] *Air New Zealand Ltd v Johnston (No 2)* [1992] 1 NZLR 159, where Cooke P stated 'the legislation is intended by Parliament to afford some measure of job security'. See also Goddard CJ's comments in *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 and *Leslie v AG* [1996] 1 ERNZ 287, where he criticised the

Labour Court had stressed that the economic necessity of retaining employment was a dominant factor, especially in times of high unemployment.[356]

However, if granted a reinstatement order took effect immediately or on a date specified by the Court or Tribunal.[357] On occasion the Court had decided that immediate reinstatement was inappropriate and it was necessary to provide time for the parties to assimilate the decision and for senior management to give instructions to staff on implementing the order.[358] The order requiring reinstatement remained in force until the result of any subsequent appeal was known.[359] Whether or not reinstatement was an appropriate remedy depended on the circumstances of the case, including the conduct of the employee.[360]

Under s 42 of the Act, the respondent could apply for a stay of the process of reinstatement.[361] Colgan J had stated that that there were five relevant issues to be taken

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approach which had been taken to reinstatement by the Employment Tribunal; to routinely award compensation for job loss instead of reinstatement was to create a licence for unjustified dismissals.

[356] *Du Pont Peroxide Ltd v Verboeket* [1993] 1 ERNZ 124. See also J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.8.

[357] *Employment Contracts Act 1991*, s 42.

[358] *Hill v NZ Rail Ltd* [1994] 1 ERNZ 113.

[359] *Employment Contracts Act 1991*, s 42; *Hill v NZ Rail Ltd* [1994] 1 ERNZ 113.

[360] *Hill v NZ Rail* Ltd [1994] 1 ERNZ 113. See *Mazengarb's Employment Law* (1999) III.39; J Hughes, P Roth, G Anderson, (eds) *Personal Grievances* (1999) 11.1, for a detailed discussion on the factors to be taken into account in determining contributory conduct and other matters having a bearing upon reinstatement; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC40.05.

[361] *Employment Contracts Act 1991*, s 42.

into account when considering whether or not a stay should be granted.[362] Ultimately, the discretion was to be implemented in a manner which meant that, taking everything into account, the overall justice of the case was considered.[363]

2.4.4(D) CONTRIBUTORY ACTIONS OF EMPLOYEE

In awarding remedies, the Employment Tribunal was required to take into account the extent to which the actions of the employee contributed to the personal grievance.[364] The contributory actions or behaviour envisaged to affect the award of compensation must have had a causal link to the act that resulted in the personal grievance.[365] Roth indicated the use of the contributory fault provisions in the legislation was commonplace, with the result that in some cases employees were receiving little or no compensation.[366]

Sections 40(2) and 41(3) required the Employment Tribunal to make reductions in compensation payable due to the contributory actions of the employee.[367] In *Paykel Ltd v*

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[362] *Kentucky Fried Chicken Ltd v Blomfield* [1992] 2 ERNZ 49.The five relevant issues were: (1) Whether in practical terms the benefit of a successful appeal would be lost to the appellant if the stay were not granted; (2) Whether the respondent to the appeal would be injuriously affected by a stay of proceedings; (3) Whether or not this was a bona fide appeal or whether the application for a stay of proceedings was made for other reasons; (4) Would a stay have preserved the status quo and if so would that have been erroneous and in breach of the terms of the award; (5) Delay in case being heard from date of filing.
[363] J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.13. *Mazengarb's Employment Law* (1999) 42.7; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC40.05.
[364] *Employment Contracts Act 1991*, s 40(2). See S Woodward, 'The Effect of Employee Conduct on Personal Grievance Remedies' (1995) 20 NZJIR 183.
[365] *Mazengarb's Employment Law* (1999) 40.10; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.45; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2002) EC41.05.
[366] Ibid.
[367] *Employment Contracts Act 1991*, s 40(2). Where the Tribunal or Court found that an employee had a personal grievance due to unjustifiable dismissal the Tribunal or Court when deciding the nature and extent

Ahlfeld Travis J established three steps that were to be followed when considering whether or not a reduction in compensation should be made:[368]

1. The Tribunal had to determine that the employee had a personal grievance due to unjustifiable dismissal;

2. When the unjustifiable dismissal was established the Tribunal was required to consider the extent to which the employee's actions contributed to the situation which gave rise to the personal grievance; The Tribunal had to give consideration to questions of causation when determining the extent to which the actions of the employee contributed to the situation which resulted in the dismissal;

3. If contributory conduct was established, the Tribunal was obliged to reduce remedies that would otherwise have been awarded. The degree of culpability was only considered at this point and could have resulted in no remedies having been awarded at all.

In *Lavery v Wellington Area Health Board* [369] Goddard CJ stated that there had to be a causal link between the conduct that equated to fault by the employee and the situation that gave rise to the personal grievance. Goddard then listed a series of factors that were to be taken into account when establishing the causal link, they were: [370]

(a) Applying common sense factors;

(b) Remoteness of fault;

(c) The likelihood, but for the fault, that the grievance would not have arisen;

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of remedies to be provided considered the extent to which the employee's actions contributed to the situation which gave rise to the personal grievance, and if those actions required, reduced the remedies accordingly. Section 41(3) of the Act provided that where the Tribunal or Court was satisfied that the facts which gave rise to the grievance were partly due to the employee's fault, the Tribunal or Court should reduce the amount payable to such an extent which it considered equitable by way of reimbursement. See *Mazengarb's Employment Law* (1999) 40.10; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.45; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC41.05

[368] *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334. See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.46; *Mazengarb's Employment Law* (1999) 40.10; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Contracts* (2000) EC40.07.

[369] [1993] 2 ERNZ 31.

[370] Ibid 33.

(d) The blameworthiness of the parties and the relative importance of the grievant's acts in bringing about the situation.

For the purposes of the *Employment Contracts Act 1991*, Goddard believed that to reduce recovery for re-imbursement or loss, the employee's conduct had to be at fault. Fault was a degree of blameworthiness that involved an identifiable course of conduct that could be said to be faulty when measured against the employee's duty to the employer.[371]

2.4.4(E) INTERIM REINSTATEMENT

Interim reinstatement was a possibility by way of an Employment Court injunction following the Employment Court's decision in *X v Y Ltd & NZ Stock Exchange*,[372] a doctrine later confirmed by the Court of Appeal in *Hobday v Timaru Girls High School Board of Trustees*.[373] The first test was whether there was a serious question to be tried; the second test was to weigh the balance of convenience between the parties (normally favouring the applicant); the third test was to assess the overall justice of the case.[374] When assessing the balance of convenience and overall justice factors the following factors were found to be relevant:

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[371] Ibid. For further discussion on contributory fault see G Anderson, 'Personal Grievance – Dismissal – Contributory Conduct – Relevance of Offer of Reinstatement to Remedies – Advocate Acting as Witness' (Jan 1998) 1 *Employment Law Bulletin* 16–17; G Anderson 'Personal Grievance – Dismissal – Contributory Conduct (Jan 1998) 1 *Employment Law Bulletin* 15–16; G Anderson 'Personal Grievances – Remedies – Reduction for Contributory Conduct' (July 1993) 4 *Employment Law Bulletin* 59; G Anderson 'Personal Grievances – Remedies – Reduction for Contributory Conduct – Relevance of Employer's Conduct' (May 1993) 3 *Employment Law Bulletin* 43.
[372] [1992] 1 ERNZ 863.
[373] *Hobday v Timaru Girls High School Board of Trustees* [1993] 2 ERNZ 146.
[374] *Mazengarb's Employment Law* (1999) 42.8; See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.49; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds), *Employment Law* (2000) EC40.05 (5).

1. Whether there were other adequate remedies available to the applicant;[375]

2. The early availability of a hearing on the substantive issue;[376]

3. Whether the delay in obtaining a hearing was so great that it "will inevitably be seen in the Tribunal as a reason militating against reinstatement even if otherwise indicated".[377]

4. An assessment of the Plaintiff's Claim;[378]

5. The nature of employment, ask whether the applicant's career path would be damaged;[379]

6. The strength of the case for reinstatement;[380]

7. Whether interim reinstatement favoured managerial practicality over maintaining the status quo and balance of convenience elements;[381]

8. Any practical effect on other employees;[382]

9. Whether the plaintiff delayed lodging the proceedings;[383]

10. Would granting reinstatement have been against public policy.[384]

In *Port of Wellington Ltd v Longwith*, it was held that it was not necessary for the plaintiff to show that exceptional circumstances existed before an interim injunction could be granted.[385]

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[375] *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights' Etc Union & Ors* [1991] 1 ERNZ 886 (Full Court).
[376] *McGivern v Watercare Services Ltd* [1993] 2 ERNZ 724, 741; *Luke v NZ Co-operative Dairy co Ltd (Anchormilk)* [1994] 2 ERNZ 295.
[377] *Ford v Hutt Valley Health Corp Ltd* [1994] 1 ERNZ 563.
[378] *Port of Wellington Ltd v Longwith* [1995] 1 ERNZ 87, 92, citing *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, 142.
[379] *X v Y Ltd and NZ Stock Exchange* [1992] 1 ERNZ 863; *Nanson v Wellington City Council* [1992] 1 ERNZ 617; *Macadam v Port of Nelson Ltd* [1992] 2 ERMZ 219; *Davidson v Telecom Central Ltd* [1992] 2 ERNZ 1067; *King v Weddel NZ Ltd*, Unreported, AEC 33/93.
[380] *Duggan v Wellington City Council* [2004] 1 ERNZ 254.
[381] *Asken v NZ Rail Ltd*, unreported, WEC 33/94, Goddard CJ.
[382] *Taylor v Air New Zealand Ltd*, Unreported, AEC 59/94; *T v Attorney General*, Unreported, WEC 62/95, Goddard CJ.
[383] *Hearle v Bay of Plenty Polytechnic Council*, unreported, AEC 80/94.
[384] Ibid. For a detailed discussion on the factors discussed above see J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.49; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Law* (2000) EC40.05; *Mazengarb's Employment Law* (1999) 42.8.

2.4.5 CHOICE OF PROCEDURES

An employee had a choice of taking a sexual harassment claim or discrimination claim either as a personal grievance under the *Employment Contracts Act 1991* or as a complaint under the *Human Rights Act 1993*.[386] Although both the *Employment Contracts Act 1991* and the *Human Rights Act 1993* provided for complaints of discrimination, the definitions of discrimination varied between the two pieces of legislation.[387]

Section 64 of the *Human Rights Act 1993* stated: [388]

> **Choice of Procedures:** Where the circumstances giving rise to a complaint of sexual harassment or racial harassment under the Act are such that an employee may take one but not both of the following steps:
>
> (a) The employee may make, in relation to those circumstances, a complaint under this Act; or
>
> (b) The employee may invoke in relation to those circumstances, the procedures applicable under the Employment Contracts Act 1991 in relation to personal grievances under the relevant employment contract.

The corresponding section in the *Employment Contracts Act 1991* made it clear that once a complaint had been accepted by the Human Rights Commission the employee could not opt to invoke the personal grievance procedure.[389] An employer action in breach of s 65 of the *Human Rights Act 1993* was capable of establishing a claim for a breach of an

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[385] *Port of Wellington Ltd v Longwith* [1995] 1 ERNZ 87, 93.
[386] *Employment Contracts Act 1991*, s 39 (1) and the *Human Rights Act 1993*, s 64. See also P Kiely, 'Discrimination and Human Rights: An Overview of Remedies' (1994) 18 NZJIR 362.
[387] See para 2.3.3(c) for discrimination in employment.
[388] *Human Rights Act 1993*, s 64 (a) and (b).
[389] *Employment Contracts Act 1991*, s 39 (2).

implied term of trust, confidence, and fair dealing in an employment contract in the context of a personal grievance action.[390]

Under the *Employment Contracts Act 1991*, it was essential that advocates, unions, and legal practitioners acquired detailed evidence of their client's case at an early stage to ensure that the correct procedure had been chosen. This could have caused considerable problems for applicants who, when notifying the employer of a problem, may not have decided on which procedure to follow – that was either to lodge a personal grievance or to make a complaint with the Human Rights Commission. It was possible that at an early stage, the employee may not have taken advice on which process was the most appropriate in the circumstances.

Under the *Human Rights Act 1993*, the time at which the choice of procedure was made was clear. This was the date when the Complaints Division of the Human Rights Commission accepted the complaint for conciliation or investigation.[391] However, the point when the personal grievance option was chosen under the *Employment Contracts Act 1991* was less clear. In *Williams v Air New Zealand*,[392] the High Court found that it would always be a matter of fact as to when the grievance procedure had been chosen.[393] In *Williams*, the employee's counsel wrote a letter to the employer, with reference to

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[390] *Trilford v Car Haulaways Ltd* [1996] 2 ERNZ 351.
[391] *Human Rights Act 1993*, s 12(1).
[392] *Williams v Air New Zealand* Unreported, Salmond J, 10 December 1999, HC, and AP119/99.
[393] Ibid.

clause 4 of the First Schedule to the *Employment Contracts Act 1991*, alleging that the plaintiff had suffered disadvantage as a result of unjustifiable action by the respondent; the personal grievance with the company was set out in detail by the appellant and concluded by seeking remedies under s 40 of the *Employment Contracts Act 1991*. Salmond J indicated that the First Schedule to the *Employment Contracts Act 1991* was the procedure for resolving personal grievances. The making of a complaint to the employer was sufficient to indicate a choice of procedures according to Salmond J.[394] In this case, it was also stated that an applicant need not go as far as paying the required fee and formally lodging a claim with either the Employment Tribunal or the Human Rights Commission to manifest a choice of procedure.[395]

2.4.6 Alternative Procedures

Alternative personal grievance procedures could be included in employment contracts, provided they were not inconsistent with those contained in the *Employment Contracts Act 1991*.[396] Reasons why parties to employment contracts utilised an alternative procedure included the desire to avoid unnecessary delay, the desire for privacy, if

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[394] Ibid 8. Salmond J stated that the original submission of the grievance under Clause 2 of the First Schedule to the *Employment Contracts Act 1991* was a mechanism to facilitate the resolving of the situation quickly. At this point, this would indicate that this was the first opportunity that the employer had to resolve the situation. If the grievance was resolved at this point, Salmond J believed that it would be inconsistent with the principles of s 39 of the *Employment Contracts Act 1991* for there still to be a possibility of action being taken under the *Human Rights Act 1993*.

[395] Ibid.

[396] *Employment Contracts Act 1991*, s 32. See also G J Anderson, 'There Must Be a Better Way: Alternative Dispute Resolution' [1997] 2 ELB 21; M Hawkesby, 'Alternative Grievance Procedures' [1998] 4 ELB 61; P Churchman, 'Avoiding the Rigour of the Personal Grievance Provisions of the Employment Contracts Act' (1997) 22 NZJIR 171; and N Taylor, 'Alternative Grievance Procedures' [1998] 4 ELB 61–84.

particular expertise relating to a specialist type of work was needed, or in some situations to avoid the formalities of the Employment Tribunal procedure or Court.[397]

A major problem facing some employees under the *Employment Contracts Act 1991* was the imposition of 'take it or leave it' contracts, whereby employers dictated the terms and conditions to be contained in a contract.[398] This effectively meant that some employees had no input into which personal grievance procedure was to apply.

Any alternative personal grievance procedure had to be effective.[399] An Industrial Relations Service study questioned the effectiveness of some alternative procedures.[400] It found providing recourse to the *Arbitration Acts* of 1908 and 1996 was inconsistent with the appeal principles in the *Employment Contracts Act 1991*.[401]

However, in *Tutty v Blackmore* it was stated that a comparison with the requirements of the First Schedule of the *Employment Contracts Act 1991* was not necessary to test the

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[397] J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.3.
[398] For a discussion on the negotiation of employment contracts, see *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576, 593, where the Court of Appeal held that parties were free to proceed on a 'take it or leave it' basis.
[399] *Employment Contracts Act 1991*, s 26(a).
[400] B Fehan, 'Using the Arbitration Act: Procedures in Employment Disputes' (1997) *Lawtalk* 475 (28 April), 7.
[401] Ibid, where it noted appeal to the High Court was inconsistent with appeal to a specialist Employment Court. See also J Hughes, P Roth and G Anderson (eds), *Personal Grievances* (1999) 2.3 and *Meredith v Radio New Zealand Ltd* [1993] 2 ERNZ 929, 932 for a description of an effective procedure. See also G Anderson, 'There Must Be a Better Way: Alternative Dispute Resolution' (1997) 2 *Employment Law Bulletin* 21, who maintained that alternative grievance procedures do not automatically provide an opportunity for employers to by-pass the Employment Tribunal and Court and that all appeal procedures must include access to the Employment Tribunal and Court.

effectiveness of an alternative procedure, and that an alternative procedure would be effective if:[402]

a) The process was fair, just, and adhered to the principles of natural justice;

b) The decision contemplated was made on the merits of the case, and was not a capricious decision;

c) The procedure was certain, efficient and just;

d) The body arbitrating was low-level, specialist and informal, and able to provide speedy and fair resolution of differences;

e) Employees were not prevented from using the procedure due to costs;

f) The procedure provided appropriate services which facilitated the resolution of differences;

g) The appropriateness of the procedure would depend on the circumstances and the parties' bargaining approaches.

Tutty also suggested remedies available under alternative procedures should not be inconsistent with Part III of the *Employment Contracts Act 1991*. Provided there was no express prohibition on remedies available, an alternative procedure was deemed effective.[403]

2.4.7 WRONGFUL DISMISSAL

The *Employment Contracts Act 1991* did not specifically exclude an employee from pursuing a common law claim for wrongful dismissal as an alternative to an unjustified

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[402] *Tutty v Blackmore* Unreported, 15 October 1999, AC 38/99.
[403] Ibid. See also L Skiffington, 'There Must Be a Better Way: Alternative Dispute Resolution' [1997] 2 ELB 21–40.

dismissal.[404] It was an alternative option for employees who were dismissed, but the cost, length of time and lack of compensation involved, made the procedure prohibitive.[405] It was also an option if the employee was outside the 90-day time limit. Employees could opt to use both processes, but double recovery was not permissible for the same complaint.[406]

An employee dismissed without cause and without an appropriate period of notice, could have access to a claim for wrongful dismissal.[407] However, where summary dismissal was justified, no notice was required. In cases of dismissal without notice and without cause, the compensation available would be the amount of money the employee would have received had the appropriate notice period been given.[408] Payment in lieu of notice prevented an action for damages in wrongful dismissal cases.[409] If the dismissal was summary in nature and there was insufficient cause for the dismissal, notice was necessary or payment had to be made in lieu.

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[404] *Employment Contracts Act 1991*, s 104(f) and (g) confer exclusive jurisdiction on matters 'connected' with employment contracts or 'founded' on an employment contract. See *Ogilvy v Mather* [1993] 2 ERNZ 799.
[405] See J Hughes, 'The Proposed Abolition of Wrongful Dismissal' [1998] 6 ELB 109–132.
[406] *Sutherland v Marlborough Girls College Board of Trustees* [1999] 1 ERNZ 665, 684.
[407] *Addis v Gramophone Co Ltd* [1909] AC 488. See also *Mazengarb's Employment Law* (1999) III.8; J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 12.11; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Law* (2000) EC27.06.
[408] *Baker v Denkara Ashanti Mining Corp Ltd* (1903) 20 TLR 37.
[409] *Hartley v Harman* (1840) 11, *A & E* 798.

An employee could take a dismissal claim without having to wait for the expiry of the notice period.[410] An employee was not required to wait until the expiry date of their employment contract to lodge an action, as to do so could have indicated no loss.[411]

In wrongful dismissal cases, the onus of proof was on the employee, not the employer, and actual misconduct or some other justification as opposed to reasonable suspicion after fair process, had to be evident.[412]

In wrongful dismissal claims the quantum of damages did not include compensation for procedural irregularities, injury to feelings, and inability to find new employment.[413] However, in conjunction with a wrongful dismissal action, it was possible to recover for injury to feelings. These claims had to be brought under a general breach of contract action.[414]

What was recoverable in wrongful dismissal actions was the amount of remuneration the employee would have earned during the notice period. This amount included all fringe benefits.[415] Damages did not include any money paid to the employee at the time of

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[410] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 452.
[411] Ibid.
[412] *Federal Supply & Cold Storage Co v Angehern & Piel* (1911) 80 LJPC 1, 8, 10.
[413] *Addis v Gramophone Co Ltd* [1909] AC 488.
[414] *Wheeler v Waitaki Meats Ltd* [1991] 2 NZLR 74. See also S Cook, 'Extension of Damages in Wrongful Dismissal Claims' (1997) 5 ELB 81–96.
[415] *Bagnall v National Tobacco Corp of Australia Ltd* (1934) 34 SR (NSW) 421, 429, per Jordan CJ.

dismissal or the value to the employee of any remuneration that they could have earned had they taken steps to mitigate their loss.[416]

In *Air New Zealand Ltd v Raddock*,[417] the applicant had been dismissed and claimed breach of an implied term of trust, confidence and fair dealing in the dismissal process. Thomas J noted what has been traditionally known as 'wrongful dismissal' is simply one particular example of the 'generic breach of contract action'.[418] Therefore, an implied term could not be inconsistent with an express term of the contract and the majority in the Court of Appeal accordingly rejected Raddock's claim.[419] The majority of the Court of Appeal held that an implied obligation of trust, confidence and fair dealing could not be implied into the terms of a contract that expressly allowed termination without cause and with one week's notice.[420] Thomas J, in a strong dissenting judgment, indicated that the power to dismiss employees only exists alongside the obligation to adhere to the principles of procedural fairness.[421] Thomas J further suggested that there was an implied obligation of trust, confidence and fair dealing, and in this case that obligation had been breached.[422]

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[416] *Shindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038; *Yetton v Eastwoods Froy Ltd* [1967] 1 WLR 104.
[417] *Air New Zealand Ltd v Raddock* [1999] 2 NZLR 641 (CA).
[418] Ibid 659.
[419] Ibid 646.
[420] Ibid 641.
[421] Ibid 659.
[422] Ibid.

The effect of *Raddock* on an action of breach of an implied term of fair treatment prior to dismissal was unclear.[423] *Raddock* emphasised the difference between statutory and common-law provisions in relation to wrongful and unjustifiable dismissal claims and the need to comply with the 90-day time limit. Henry J found that the legislature had introduced the concept of justifiability in to the contractual rights of dismissal, however in this case the statutory principles did not apply as there was no attempt to invoke the statutory procedures within the correct timeframe, therefore the common law procedures for wrongful dismissal were the relevant matters to consider.[424]

A feature of wrongful dismissal claims was that the wrongfully dismissed employees should attempt to mitigate loss.[425] In such circumstances, the employee was expected to seek alternative employment, but only for such positions as she/he could reasonably be expected to accept, bearing in mind experience, standing and employment history.[426] If a person was offered re-employment and they unreasonably rejected it, they were not then in a position to sue for wrongful dismissal.[427] In all such cases, mitigation was a question of fact and the employer had the burden of proof in these circumstances.[428]

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[423] *Mazengarb's Employment Law* (1999) 1052; P Bartlett, W C Hodge, P Muir, C Toogood, R Wilson, J Bull (eds) *Employment Law* (2000) EC27.06.
[424] *Air New Zealand Ltd v Raddock* [1999] 2 NZLR 641, 646 (CA).
[425] *Monk v Redwing Aircraft Co Ltd* [1942] 1 KB 182.
[426] *Edwards v Society of Graphical & Allied Trades* [1970] 1 All ER 905.
[427] *Wilson v Kisri* (1900) 18 NZLR 807. See also *NZ Fruit & Produce Co Ltd v Taylor* (1908) 11 GLR 43.
[428] *Bagnall v National Tobacco Corp of Australia Ltd* (1934) 45 SR (NSW) 430; *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353.

In summary, a wrongful dismissal cause of action was not usually relied upon due to the limitation on what could be recovered in damages. Re-instatement was not available,[429] there were lengthy delays, and the process could be stressful and expensive. For example, no mediation was available to resolve the issues quickly.[430]

By contrast, an unjustifiable dismissal action under the personal grievance provisions in the *Employment Contracts Act 1991* provided easier access, wider remedies, including possible reimbursement of wages lost, reinstatement, compensation for humiliation or loss of dignity and injury to feelings of the employee, and loss of benefit, whether monetary or not and, in sexual harassment cases, 'recommendations' to the employer regarding the perpetrators.[431]

2.5 EMPLOYMENT TRIBUNAL IN OPERATION

In 1991, as noted earlier, Parliament accepted that recourse to the common law provided insufficient protection and was a cumbersome option.[432] Consequently, specialist

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[429] *Harema v Tai Tokerau Corporation Ltd*, unreported, Colgan J, 24 November 1995, ACE 124/95.
[430] An alternative cause of action would be to seek an injunction for specific performance of the contract; however, the common law courts have been reluctant to impose this type of remedy. See *McGivern v Watercare Services Ltd* [1993] 2 ERNZ 724 and *Cox v PAE New Zealand Ltd*, unreported, Goddard CJ, 26 March 1997, WEC 13/97.
[431] *Employment Contracts Act 1991*, s 40(1).
[432] R Ryan and P Walsh, 'Common Law v Labour Law: The New Zealand Debate' (1993) *AJLL* 230.

institutions were retained, with the creation of an Employment Tribunal[433] and the establishment of an Employment Court as a court of record.[434]

The Employment Tribunal operated from three offices: Auckland, Wellington and Christchurch, and serviced Hamilton and Dunedin.[435] The Hamilton and Dunedin areas became independent jurisdictional areas in 1996/97 and from that time operated from offices located in both centres.[436] If personal grievances occurred outside main city-centres, often employment tribunal adjudicators would travel to a regional centre to conduct personal grievances. For example, a problem which occurred on the West Coast of the South Island could have resulted in an employment tribunal adjudicator travelling to Greymouth to hear the case. Likewise a personal grievance arising in Nelson or Blenheim would result in an adjudicator travelling there to hear the case. This requirement for employment tribunal adjudicators to travel means that the findings in this research cover the whole of New Zealand, and are not limited to main cosmopolitan centres. In the final year of the *Employment Contracts Act 1991*, there was a total of 27 adjudicators/mediators. All adjudicators had a warrant to both mediate and adjudicate.

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[433] *Employment Contracts Act 1991*, s 77.
[434] Ibid, s 103. See also B Robertson, 'The Arguments for a Specialist Employment Court in New Zealand', (1996) 21 NZJIR 34; L Skiffington, 'The Role of Specialist Legal Institutions in Bargaining under the *Employment Contracts Act 1991*: Saboteurs or Saviours?' (1996) 21; NZJIR 49; G Anderson, 'The Specialist Institutions: The Employment Court and the Employment Tribunal' (1996) 21 NZJIR 1; and J Hughes, 'The Employment Tribunal and the Employment Court' (1991) 16 NZJIR 175.
[435] *Employment Tribunal Regulations 1991*, SR 1991/227/sch 1.
[436] Personal correspondence with Alastair Dumbleton, Chief of the Employment Tribunal, 17 September 2004.

However, if an Employment Tribunal member performed mediation in one particular case, they were not permitted to subsequently perform adjudication in the same case.[437]

There were 13 Employment Tribunal members in Auckland, one in Hamilton, seven in Wellington, four in Christchurch and two in Dunedin.[438] If a personal grievance occurred outside these districts, hearings could be held in other areas, for example, Timaru, Greymouth or Rotorua.

A study by McAndrew found that over 40 percent of Employment Tribunal adjudications involved 'substantive' issues. Most cases related to dismissals. In 64.3 percent of personal grievance claims, applicants obtained some positive result. He found only 57 applicants represented themselves from a total of 2208. Consequently, the cost of representation was a significant issue.[439]

The Department of Labour, in a December 1999 briefing to Ministers, indicated that it was anticipated that the optimal time for dispute resolution would be two to three months. However, the reality was that waiting times significantly exceeded this estimate. In regional areas, waiting times for resolution of personal grievances could be 8–16 months

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[437] *Employment Contracts Act 1991*, s 81(5).
[438] Letter from Alastair Dumbleton, Chief of the Employment Tribunal, 16 April 1998.
[439] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 NZJIR 365.

for mediation, and 11–22 months for adjudication.[440] McAndrew noted that officials contended that national reductions in waiting time could be expected, but not consistently across the country. Employment Tribunal members believed that the reason for the considerable waiting time was due to the backlog of personal grievances from previous legislation.[441]

However, Employment Tribunal members suggested it would have been reasonable to expect that by 1999, the backlog of outstanding personal grievances created under previous legislation would have been resolved. They indicated the issue may have been one of funding for the Tribunal's services or due to an increased level of work resulting from increased jurisdiction.[442]

Roth suggested the procedure was more accessible than prior to the *Employment Contracts Act 1991*, but resolution of personal grievance complaints was not as expeditious as the Minister of Labour had intended. He noted that it was not unusual for several years to pass between the occurrence of a personal grievance and its resolution.[443]

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[440] Department of Labour, Briefing to Ministers of Accident Insurance, Immigration, Labour, and Social Services and Employment (1999).
[441] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24(3) *NZJIR* 365.
[442] Telephone interview, Dr Ian McAndrew, 5 July 2001, Walter Grills and Fiona McMorran, 2 July 2001 (Employment Tribunal members).
[443] J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.16. See also 'The Issues Paper on Personal Grievances' Minister of Labour, Undated, for a discussion on the Coalition Government's perspective on delay, and further discussion by Chief Judge Goddard, 'The Issues Paper on Personal

This was in stark contrast to the express intention of Parliament, when introducing the *Employment Contracts Act 1991*, to make the resolution of personal grievances, quick, easy and inexpensive[444] and the legislative object of the Employment Tribunal to provide 'a speedy, fair and just resolution of differences between the parties.'[445]

2.6 SUMMARY

Chapter Two has identified the development of law in New Zealand in relation to personal grievances. It was necessary to outline the historical development of the legal framework in order to analyse the progression of the procedures and how they worked to determine whether adjudication or an alternative process is the most appropriate way to resolve personal grievances.

The first law which established a conciliation and arbitration process for dealing with collective disputes was passed in 1894 by the *Industrial Conciliation and Arbitration Act*.[446] This legislation established industrial awards and agreements to protect the collective interests of employees and established a procedure for the creation and resolution of any disputes in relation to the negotiation and enforcement of awards

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Grievances' (1997) 8 *ELB* 133 and J Hughes, 'The Issues Paper on Personal Grievances' (1997) 8 *Employment Law Bulletin* 133–152.

[444] (1991) 524 NZPD 1437.

[445] *Employment Contracts Act 1991*, s 76(c). See A Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21 NZJIR 21.

[446] For a more detailed discussion on this topic, see n 4.

and agreements.[447] The 1894 legislation remained in force largely intact until 1954, when a consolidated statue was passed.[448] At this time, the only legal remedy available to dismissed employees was through the common law courts.

The *Industrial Relations Act 1973*, for the first time, gave employees the right to take a personal grievance for unjustifiable dismissal without the necessity of accessing the common law courts.[449]

The passage of the *Labour Relations Act 1987* established a mediation service and created Grievance Committees with equal numbers of representatives from employers and employees in an attempt to resolve personal grievances. The act also stated that access to the personal grievance machinery was a benefit only available to union members.[450]

Concurrently with the *Industrial Relations Act 1973*, employees in the state sector had their conditions of employment and personal grievance procedures catered for by the *State Services Act 1962*.[451] However, the passage of the *State Sector Act 1988*

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[447] For a more detailed discussion on this topic, see n 7.
[448] See n 18 and 19.
[449] See n 38 for the establishment of a legal process in relation to the definition and resolution of personal grievances.
[450] See n 60.
[451] See n 74.

amalgamated both the private and public sector systems for resolution of personal grievances.[452]

These processes stayed in force until the passage of the *Employment Contracts Act 1991* by the National Government. For the first time, this legislation gave access to personal grievances to all employees irrespective of union membership.[453] This was an innovation strongly promoted by the National government of the day.[454]

Personal grievances as defined in Section 27(1) of the *Employment Contracts Act 1991*[455] remained largely unchanged from the definition contained in the *Labour Relations Act 1987*. However, new institutions were established to assist with the resolution of personal grievances and different procedures were formulated. For example, there were tighter requirements for lodging a personal grievance and restrictions on the timeframe within which a personal grievance had to be lodged.[456] Mediation was an option for resolving personal grievances, however, this was no longer compulsory under the new Act.[457]

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[452] See n 76.
[453] See n 82.
[454] Ibid.
[455] See Section 2.3.3 above.
[456] See n 188, 189 and 196.
[457] See n 240.

The procedure for lodging and responding to a claim of personal grievance was set out in the *Employment Tribunal Regulations 1991*.[458] The process for lodging and amending claims of personal grievance was prescriptive and could only be amended by the adjudicator if a claim had been made under the wrong part of the legislation.[459] On application by the parties, the Employment Tribunal could inform of its intention to adjudicate a personal grievance.[460] Under Section 88(7) of the *Employment Contracts Act 1991*, the adjudication hearings were a court of record and details of the procedure were set out by Regulation 49(1) of the *Employment Tribunal Regulations 1991*.

The hearing procedure itself contained in the *Employment Tribunal Regulations 1991* was formal in nature and quite complex in its operation. Together with its adjudication function, the Employment Tribunal had the authority to award costs against the losing party. Alternatively, the Tribunal could allow costs to lie where they fell. A further factor to be considered when evaluating costs was the potential impact of legal aid. For example, costs could not be awarded against a legally-aided client unless exceptional circumstances existed, which could have meant potential difficulties for a party whose case was found to be successful by the Employment Tribunal.[461]

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[458] See n 258
[459] See n 259 and 260 for discussion on amendments to statement of claim.
[460] See n 296.
[461] See n 298.

If parties were dissatisfied with the outcome of a personal grievance, they had the right to appeal to the Employment Court but only on questions of law.[462] Significantly, it was not possible to introduce new evidence on appeal that had not been previously considered by the Employment Tribunal during adjudication.[463]

The provision for the Employment Tribunal to award remedies in personal grievance cases was found in Sections 40, 41 and 42 of the *Employment Contracts Act 1991*.[464] Notably, whilst reinstatement was available, it was no longer the primary remedy as had been the case under the *Labour Relations Act 1987*.[465] A further consideration which had to be made by the Employment Tribunal when assessing remedies was the impact of contributory actions by the employee to the situation complained of.[466]

Under some circumstances an employee had the choice of either taking a personal grievance under the *Employment Contracts Act 1991* or, to make a complaint to the Human Rights Commission under the *Human Rights Act 1993*. The choice of procedure was only available under limited circumstances, for instance, complaints of sexual harassment or discrimination. However, claims of discrimination could also include dismissal as an employee may have been dismissed on discriminatory

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[462] See n 312 and 313.
[463] The introduction of new evidence on appeal was not possible under Section 95(4) of the *Employment Contracts Act 1991*.
[464] The details of available remedies are detailed in n 314.
[465] For further discussion on reinstatement see n 352 to 356 and accompanying text.
[466] See n 364 and 365.

grounds.[467] Once the employee had chosen which procedure to use, they were unable to revert to the other option.[468]

When considering whether the retention of a specialist employment jurisdiction was desirable or reliance on the common law courts as an alternative, the National Party decided retaining the specialist jurisdiction was the more appropriate option.[469] To determine whether or not the adjudication system worked, it was necessary to devise a structure for analysis encompassing the framework within which the system operated, the opinions of adjudicators, and the experiences of participants who used adjudication in 1997.

How the personal grievance adjudication system and its availability developed is important to determine the issues which arose from the changes created by government. As the National Party had claimed that they wished to create an easy, cheap and fair process, it was necessary to examine whether this had been achieved through analysis of the following three factors:

a) Coverage of the Personal Grievance Procedure

With the passage of the *Employment Contacts Act 1991*, all employees were entitled to take a personal grievance on the grounds of unjustifiable dismissal or unjustified action by an employer. Prior to this legislation, only those employees

[467] See n 386 to 388.
[468] See n 388 and 389.
[469] See n 432, 433 and 434.

who had their terms of employment contained in an award or agreement had access to this process. All other employees were required to take such complaints to the common law courts. This also meant that for the first time, senior level employees had access to the same procedure as more junior staff members. Broadening access to the personal grievance procedure, could however, have caused problems with access to adjudication as a considerably larger number of employees for the first time had access to it. This could have resulted in substantial waiting times for claims to be heard and resolved.

b) Representation

For the first time, access to the personal grievance procedure was no longer restricted to union members unless exceptional circumstances existed, as had been the case under preceding legislation. Consequently, many employees chose not to be represented by a union, but instead to use the services of either counsel or an advocate. This could have created problems as employment law had previously not been considered by legal representatives to be lucrative. As a result, many new counsel and advocates began to practice in the employment law area with little knowledge or experience in the discipline.

Those who chose to represent themselves were also likely to cause difficulties for the adjudication system. They were unlikely to have the necessary skills for presenting their own case, or, for examining or cross-examining witnesses. It was

therefore likely that adjudicators would have been called upon to assist self-resented parties when required.

c) The Adjudication Process

The adjudication process was complex and formal. The hearing environment resembled a court room with evidence being presented, examined, and cross-examined by the parties. While was some flexibility for adjudicators to amend this procedure to suit the circumstances of the case, this was infrequently utilised. There were often substantial delays in the allocation of hearing dates, and there were often delays in adjudication decisions being presented by adjudicators. These issues will be discussed and analysed in more detail later.

My previous experience in working both as a union industrial officer and organiser and public service solicitor who was partly responsible for the drafting of the personal grievance procedure provided me with a fair level of insight into potential difficulties with the legislation and its implementation both from the perspective of employees and employers. The knowledge of these potential problems allowed me to analyze the difficulties generated by the structure of the legislation and the procedures contained in it. I was aware for instance, both from a legal perspective and from practical experience, that under the *Labour Relations Act 1987* a relatively informal method existed for resolving personal grievances. It therefore appeared a massive jump in principle to create a formal adjudication system which resulted in

potential difficulties for parties to personal grievances. It does however need to be noted that mediation was an option for resolving personal grievances under the *Employment Contracts Act 1991*, but it must be emphasised that this was only voluntary, and there was serious potential for mediation to be used as a 'fishing expedition' rather than a true attempt at dispute resolution.

My background, experience and consequent strong political awareness of the debate between employers, employees and unions enhanced by the extensive propaganda published by representatives from both sides drove me to determine whether or not the employment tribunal adjudication system worked. Due to the formal structured nature of adjudication, a significant issue was to determine whether parties received adequate and affordable representation either through a union, employer's representative, or through counsel or advocate. Further significant issues related to the actual cost of taking a personal grievance, the adequacy of remedies granted and costs incurred if a personal grievance was established. These factors assisted me in devising the most suitable research questions to be considered in this thesis, as explained in the following chapters.

CHAPTER 3

THE EFFECT OF ADJUDICATION UNDER THE *EMPLOYMENT CONTRACTS ACT 1991* ON ACCESS TO JUSTICE AND RELATED ISSUES.....113

Chapter 3

THE EFFECT OF ADJUDICATION UNDER THE *EMPLOYMENT CONTRACTS ACT 1991* ON ACCESS TO JUSTICE AND RELATED ISSUES

3.1 INTRODUCTION

The whole question of access to justice is particularly significant to the topics considered in this thesis as it relates to issues including representation and its cost, the nature of the procedure itself, relevant costs involved and whether the adjudication process is comprehensible to parties using it, as specified in the thesis questions.

Chapter Three will identify the issues that impacted on resolving personal grievances under the *Employment Contracts Act 1991*, and discuss the affect of access to justice in the resolution of personal grievances. The findings will be analysed and compared with similar studies and academic commentary on the issues identified.

Whilst considering the issues of natural justice it was important to take into account the views of adjudicators who were interviewed regarding the personal grievance process. Several adjudicators were from a legal services background and had considerable opinions on the issues relating to natural justice.[1]

[1] For details, see Chapters 6 and 8.1.

The most pertinent issues examined include costs, delay and matters of process; investigating the formality of proceedings and the impact of lawyers on a process legislatively intended to be informal. The general notion of access to justice is discussed in the context of the principle of natural justice, including fairness, the right to be heard and respond, the right to a neutral determination and the impact of formal cross-examination. In discussing access to justice, remedies and outcomes are also examined to determine whether or not they were a disincentive to bringing a personal grievance.

Issues surrounding cost, delay and the process itself were found to frequently overlap. For example, cost may impact on the right to representation or indeed the possibility of taking a personal grievance at all. The further risk of bringing a personal grievance was found to be that costs may be awarded against the unsuccessful party or that despite a successful outcome they may be deemed to rest where they fall.

It is observed that delay has an effect on cost and may directly affect access to justice. There were a number of explanations for the delays inherent in the process experienced by parties under the *Employment Contracts Act 1991* including the procedural steps involved in lodging a personal grievance, hearing date allocation time lapse and eventual decision production. Formality imposed by Regulations was also found to have resulted in a litigation culture being imposed on what was intended to be a low-level, informal procedure.

3.2 ACCESS TO JUSTICE

For a democratic society to function adequately the effective resolution of disputes is essential.[2] The effectiveness of an adjudication system depends on an individual's ability to access it and to be able to use it easily for dispute resolution. Access to justice is a recurring theme commented upon by academics, organisations and individuals because of its importance to the rule of law and the rights of individuals to the protection of the law.[3] The precise meaning of access to justice may vary depending on the context in which it arises and the weight that different user groups give to different factors pertinent to their needs.

In the employment context, the nature and importance of work, particularly in modern society, means that people often define themselves by their employment status. Access to justice when employment security is at risk is therefore very important. Ellen Dannin suggests 'work is not just a private matter' but it affects all areas of our lives:[4]

> Our own jobs – or lack of them – give us our status, our friends, our enemies, our viewpoints, our opportunities, and our children's opportunities – or lack of them. Work provides structure and organizes our days, our weeks and our years… The content of the pay packet, what the job does to the human body and spirit, and the opportunities it creates or stifles – all these spill over into our environment.

[2] Sir Ivor Richardson, 'The Courts and Access to Justice' (2000) 31 *Victoria University of Wellington Law Review* 163: '[T]he equal protection of the law and the due process of the law underpin the resolution of disputes between citizen and citizen, and citizen and the State. That is fundamental to the functioning of democracy.' See also, New Zealand Human Rights Commission, *Access to Justice*, Paper presented to the Royal Commission on Social Policy, 25 November 1987, 1; 'It is not possible to attain a fair society if the citizens of that society are denied or otherwise restricted in their ability to obtain equal access to justice.'

[3] Joanne Morris, *Women's Access to Legal Services: Women's Access to Justice, He Putanga Mo Nga Wahine Ki Te Tika* (1999) 1. See also, *Access to the Law. A research and Discussion Paper*, Department of Justice, Planning and Development Division, October 1981, Foreword; 'The social health of a nation can be judged by the way it provides access to the law to enable people to exercise the rights that every citizen has.'

[4] E J Dannin, 'Confronting the Employment Contracts Act' (1997) 28 *California Western International Law Journal* 1, 2.

Losing a job may have an immediate or delayed impact, could result in a person dropping in social status and may affect the health and very existence of a person.[5]

3.2.1 Definition of Access to Justice

Access to justice is defined as the provision by the State of timely, affordable, easily accessible and independent dispute resolution services, including access to appellate bodies and the provision of appropriate representation. Ideally, a justice system should be easily understood, participants should be treated fairly during a process and outcomes should be just and appropriate to the circumstances of each case. The principles required to implement this ideal are well set out by Lord Woolf in his report on access to justice.[6] The report indicates that a civil justice system should:

(a) be *just* in the results it delivers;
(b) be *fair* in the way it treats its litigants;
(c) offer appropriate procedures at a reasonable *cost*;
(d) deal with cases with reasonable *speed*;
(e) be *understandable* to those who use it;
(f) be *responsive* to the needs of those who use it;
(g) provide as much *certainty* as the nature of particular cases allows; and
(h) be *effective*: adequately resourced and organised.

A mental picture of what the ideal of access to justice would look like was provided by Joanne Morris in a study which utilises the metaphor of the justice system being like a public building to which all citizens should have access.[7] The difficulty, according to Morris, is whether or not all citizens know where the building is and have access to it, the location of the entrance ways may not be common knowledge, and navigating the routes

[5] Ibid. For further discussion on the economic context of employment, see Gordon Anderson, 'The Origins and Development of the Personal Grievance Jurisdiction in New Zealand' (1988) 13 NZJIR 257, 258.
[6] Lord Woolf, *Access to Justice*: *Final Report to the Lord Chancellor on the Civil Justice System* (1996) 2.
[7] Joanne Morris, *Women's Access to Legal Services: Women's Access to Justice, He Putanga Mo Nga Wahine Ki Te Tika* (1999) 1.

through the building to the relevant rooms may be near impossible.[8] Morris further suggests:

> In terms of the metaphor, some New Zealanders cannot find or use the pathways to the public building which is the justice system. Some cannot afford the price of entry. Some find the corridors to the rooms they need to visit so cluttered as to be impassable. They are compelled to exit through the building's windows rather than its doors. Barriers such as these thwart the achievement of the justice system's purpose – to secure the protection of law and just outcomes for all.

Morris' acknowledgement of outcomes as an important aspect of access to justice invites discussion of the wider legal process and the consequences for users. In contrast, other definitions tend to focus largely on access to the 'front door' only or discuss access to justice without providing a specific or wider definition.

While access to justice is not a principle enshrined in a New Zealand 'constitution' as of distinct right, there are indirect legislative provisions referring to the issue.[9] Many of these provisions are based on International Labour Organisation Conventions and other international documents to which New Zealand is a signatory. For example, Articles 8 and 10 of the *Universal Declaration of Human Rights 1948* provide the rights of individuals to 'full equality to a fair and public hearing'[10] by an independent tribunal and 'the right to an

[8] Ibid 2.

[9] New Zealand does not have a formal written constitution, but constitutional principles are held in various pieces of New Zealand legislation, for example the *New Zealand Constitution Act 1986*, and also embodied in Parliamentary Conventions. This contrasts with Canada where access to justice is entrenched in the Canadian Charter of Rights and Freedoms, s 15(1); 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

[10] *Universal Declaration of Human Rights 1948*, art 10; 'Everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

effective remedy.'[11] Similarly, the *International Covenant on Civil and Political Rights 1976* contains several Articles addressing access to justice matters.[12]

In general terms, international conventions and treaties do not have authority in New Zealand law unless contained in domestic legislation.[13] However, the development of New Zealand law has shown that where international instruments have been ratified by the New Zealand government the courts have interpreted domestic legislation in accordance with the principles contained in such international instruments. Even without ratification the courts have found that the rights under discussion have been so fundamental that it would be inappropriate not to interpret the law 'in accordance with generally accepted international rules and in accord with New Zealand's international obligations.'[14]

In an employment law context, International Labour Organisation Conventions contain provisions setting standards including provision for the rights of individuals where their employment has been terminated which are closely reflected in current New Zealand

[11] Ibid, art 8; 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

[12] *International Covenant on Civil and Political Rights 1976,* art 2.3(a) provides for an 'effective remedy'; art 2.3(b) provides the right to competent judicial, administrative or legislative determination of such remedies. Art 14.1 provides: 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' Art 26 provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'

[13] See *Ashby v Minister of Immigration* [1981] 1 NZLR 222; *R v Secretary of State for Employment* [1997] 2 All ER 273. However, according to John Hughes, Paul Roth and Gordon Anderson (eds) *Personal Grievances* (2006) 3.44 'The Role of International Conventions', 'some modification of this view has been suggested in relation to treaties establishing norms of international human rights.' See *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

[14] *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA). See, John Hughes, Paul Roth and Gordon Anderson (eds) *Personal Grievances* (2006) 3.44 'The Role of International Conventions.'

personal grievance legislative provision.[15] Although ILO Convention 158 has not been ratified, the New Zealand Court of Appeal has held that 'the terms of, and decisions upon, international instruments dealing with fundamental rights' should be referred to 'when interpreting the scope of those rights under our Bill of Rights Act and other relevant legislation.'[16] This approach was supported in the Employment Court by Chief Judge Goddard in *Smith v Radio i Ltd*;[17] where he indicated that: 'The state of employment law in New Zealand is capable of being influenced by international minimum standards, the inspiration for some of which came originally from this country.' Various aspects of ILO Conventions are now explicitly incorporated in the *Employment Relations Act 2000.*[18]

On a wider front, the lack of an explicit constitutional basis for access to justice in New Zealand was criticised by B V Harris who believed that 'the principle of *equal* access to justice warrants the status of a foundation constitutional principle', an opinion endorsed by Lord Diplock and others before him.[19]

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[15] International Labour Organisation Convention 158, Article 8: 'A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.' Convention 158, Article 9(b) provides that the impartial body 'shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.'

[16] *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 (CA) Gault J applying *Ministry of Transport v Noort* [1992] 3 NZLR 260.

[17] *Smith v Radio i Ltd* [1995] 1 ERNZ 281.

[18] *Employment Relations Act 2000*, s 3 gives one of the objects of the Act as promoting the observance of the principles underlying ILO Conventions 87 and 98. *Employment Relations Act* 2000, s 66 reflects aspects of the *Smith v Radio i Ltd* decision and reasoning regarding fixed term employment. See, John Hughes, Paul Roth and Gordon Anderson (eds) *Personal Grievances* (2006), 3.44 'The Role of International Conventions.'

[19] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282 (emphasis in original). See *Bremer v South India Shipping Corporation Ltd* (1981) AC 909, 917; Lord Diplock, 'Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes… The means provided are courts of justice to which *every citizen has a constitutional right of access.*' Cited in Lord Woolf, *Access to Justice*: *Interim Report to the Lord Chancellor on the Civil Justice System* (June 1995). See also B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] *New Zealand Law Review*

Whilst as discussed above, there is no central constitutional document which provides for access to justice in New Zealand, the topic continues to be subject to debate. In general terms, there has been an increased awareness of the principle of access to justice within the legislative framework, where varying approaches have been taken to different legal processes. For example, s 4 of the *Maori Language Act 1987* permitted the use of Maori language in courts, thus improving access to justice for some Maori, and the *Children, Young Persons and Their Families Act 1989* created a greater opportunity for offenders and their victims to be involved in resolving their problems.[20] There was also extensive discussion during the 1990s on the provision of legal aid. The reform of the *Legal Services Act 1991* was undertaken in 1994, which had significant impact on the availability of legal aid assistance to parties in disputes.[21] The importance of the availability of legal aid to facilitate access to justice is discussed in more detail in Chapter Eight.[22]

The *New Zealand Bill of Rights Act 1990* does not specifically contain a definition of access to justice but does provide for the prohibition of discrimination and 'appear[s] to assume a right of access to the courts.'[23] In the Bill of Rights White Paper the Justice and Law Reform Select Committee commented that unless the Bill of Rights provided for

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282, 285, who argues 'the primacy of the principle of equal access to justice was recognized in Magna Carta 1215: "To no one will we sell, to no one will we refuse or delay right or justice".'

[20] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 285. Harris also cites the *Resource Management Act 1991* where the legislature created statutory rights of appeal, giving statutory recognition to the principle of access to justice.

[21] *Review of the Legal Services Act 1991*, Legal Services Board (1994).

[22] See Chapter 8.2.3(a).

[23] *Bill of Rights Act 1990*, s 21, sets out the prohibited grounds of discrimination. Discrimination in employment matters is covered in ss 22 and 23. See also B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 286.

guaranteed access to the courts it would be 'irrelevant to the mass of people within this society who do not enjoy the "right of access to justice" at the present time.'[24]

Likewise, the *Human Rights Act 1993* gave access to individuals complaining about discrimination to a mediation and investigation process conducted by the Human Rights Commission.[25] An appeal right beyond this is available to the Complaints Review Tribunal and in some circumstances to the High Court.[26]

Whilst individuals require access to justice to obtain and potentially enforce their legal rights, the State too has an interest in maintaining control over central functions and obligations which it is required to provide. In some circumstances the interests of the individual may be opposed to those of the State or may need to be balanced against public and fiscal interests. Harris commented that '[n]otwithstanding the attractiveness of the ideal of equal access to justice, the inevitable fiscal constraints on Government mean that it will only remain aspirational.'[27]

It is submitted that despite fiscal limitations, the Government is under an obligation to provide equitable access to the justice system. As Rosalie Abella J said in 1983:[28]

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[24] Sir Ivor Richardson, 'The Courts and Access to Justice' (2000) 31 *Victoria University of Wellington Law Review* 163, 164, citing the Justice and Law Reform Select Committee *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper, A Bill of Rights for New Zealand* (1986).

[25] Under s 5(g) *Human Rights Act 1993* the Human Rights Commission also had the authority to investigate matters without an individual complaint: 'The functions of the Commission shall be – (g) to inquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that human rights are, or may be, infringed thereby.'

[26] *Human Rights Act 1993*, s 83.

[27] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLR 282, 309.

[28] Justice Rosalie Abella, 1983, cited in Joanne Morris, *Women's Access to Legal Services: Women's Access to Justice, He Putanga Mo Nga Wahine Ki Te Tika* (1999) 1, 107.

> Anyone…who needs legal services should have access to them, regardless of financial, communication, or physical barriers. To deny access to legal services is to deny at the outset access to the law. To deny access to the law is to deny justice, and to deny justice to some is to threaten the integrity of all.

Failure to provide access to the judicial process not only prevents differences from being resolved but it may also cause people to 'unnecessarily suffer continuing injury, losses and disadvantage, or arbitrarily be denied a remedy for past injuries, losses and disadvantage'.[29] However, in a paper prepared by the New Zealand Human Rights Commission in 1987, the Commission states that although legal remedies were in theory available to all, there were often practical difficulties placed in the way of those who most needed assistance.[30]

Access to any dispute resolution process should be complete. This should include access to any appellate court to rectify any errors in the law made by the lower court, to ensure any legal interpretation is correct[31] and that any compensation awarded is adequate in the circumstances.[32] Access at appellate level is particularly affected by legal funding issues, including legal aid remuneration levels.[33] A survey of legal practitioners in 1997 showed that there was marked dissatisfaction with legal aid rates for senior practitioners and with

[29] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLR 282, 284.

[30] New Zealand Human Rights Commission, *Access to Justice*, Paper presented to the Royal Commission on Social Policy, 25 November 1987, 11.

[31] Sir Ivor Richardson argues that 'access' is usually seen as access to the lower courts, but the 'ability to access appellate courts may be equally important… an appeal court is able to correct errors made in the lower courts. This function is directly concerned with doing justice to litigants as it ensures that the determination of their rights in the court below was made upon a correct understanding of the law.' Appellate courts also fulfil an important function in the development of the law. See Sir Ivor Richardson, 'The Courts and Access to Justice' (2000) 31 *Victoria University of Wellington Law Review* 163, 164.

[32] Although the level of compensation does not directly affect access to justice it could act as a disincentive to parties who may have legitimate grounds for a personal grievance if levels are too low or the potential of costs awarded against the party would negate the compensation award.

[33] Gabrielle Maxwell, Paula Shepherd and Alison Morris, *Legal Aid Remuneration: Practitioners' Views*, A Report to the Legal Services Board, Institute of Criminology (August 1997) 5.

guideline fees for appeals and preparation time.[34] This could have resulted in a disincentive for senior practitioners to act in legal aid cases and reduced the likelihood of taking cases to appeal.

Complete access also means access to representation to ensure guidance through what may be a complex legal process. Sir Ivor Richardson identified that access to justice was not restricted to accessing the courts but included having assistance to find your way through the court system.[35] Access to the court represents only the first stage in accessing justice. A person will also need assistance to present their case in the most effective manner and put forward the best arguments and rebuttal evidence. Effective representation for both parties should go some way towards ensuring equality of access. Parties also at the outset need advice on whether or not they have a legitimate claim and what process is available for optimum dispute resolution.[36]

Some of the access to justice barriers that exist include fear of and discomfort with the judicial process itself and the overall cost of bringing a claim. The potential of losing a case and having costs awarded against you are also significant disincentives to taking action.[37] A further barrier to accessing justice is cultural alienation. The court environment is for some a formal, intimidating atmosphere which many people find 'austere and

[34] Ibid.
[35] Sir Ivor Richardson, 'The Courts and Access to Justice' (2000) 31 *Victoria University of Wellington Law Review* 163, 169: 'The ability to access justice depends not only on the operation of the courts, but also on the ability to be represented before them.'
[36] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] *New Zealand Law Review* 282, 284. 'Access to the courts is in large part dependent upon access to quality legal advice and services. Lawyers and the courts act in tandem to resolve legal disputes. Legal advice is often needed, for example, to initiate proceedings in the courts, to ensure the facts and law relevant to a claim or defence are put before the court in the best possible way, and to facilitate settlement where this is appropriate.'
[37] For discussion on costs and their effect on access to justice see Chapter 8.2.3. See also Chapter 6.4.7.

threatening'[38] and which many non-European users find uncomfortable and potentially alienating.[39] Harris has identified further groups who experience discrimination in using the legal system, including women, poor people, and other ethnic minorities.[40] People with disabilities are also a group who experience difficulties using and functioning in the legal system and are currently seeking to make the whole court process more accessible.[41]

New Zealand is comprised of diverse population groups many of whom experience considerable economic and social problems. While these problems are not caused by the New Zealand justice system, it is the mechanism they often use to attempt a resolution of their differences.[42] The aforementioned groups may need extra help in accessing the system given that they are 'already disadvantaged in social and economic terms.'[43] For example, in a study on Women's Access to Legal Services, Joanne Morris described the problems which women experience in using the justice system. Morris also acknowledged that women from minority cultures would experience double disadvantage.[44] She stated that women described the process as 'mysterious and daunting'[45] with the procedure being

[38] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] *New Zealand Law Review* 282, 294; 'The court environment is austere and threatening to the unfamiliar. This is particularly so for the young, the unworldly, and those who do not identify with New Zealand's dominant European culture.' See also, *Te Whiainga I Te Tika; In Search of Justice*, Report of the Advisory Committee on Legal Services, Department of Justice (1986) 51; 'Courts can be seen as negative, dehumanising, intimidating, inefficient, overloaded, culturally alien and insensitive, and designed to meet the needs of those in the legal industry instead of the consumers. Court processes should be dramatically restructured to meet the needs of the consumers and foster community participation.'

[39] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZL Rev 282, 294–295; 'Few aspects of contemporary New Zealand life mirror so closely the English model.' Harris says that by allowing the use of the Maori language in court proceedings under s4 *Maori Language Act 1987*, Parliament 'has indirectly acknowledged the principle that the justice system should be attuned to the culture of its users.'

[40] Ibid 305.

[41] Personal experience of the author: Assembly of People with Disabilities, Annual General Meeting, November 2005.

[42] Joanne Morris, *Women's Access to Legal Services: Women's Access to Justice, He Putanga Mo Nga Wahine Ki Te Tika* (1999) 6.

[43] Ibid.

[44] Ibid 33.

[45] Ibid.

formal, complex and not part of their everyday existence.[46] Women were also critical of what they described as the dominant 'male culture' of the justice system including the predominance of male lawyers and judges. Women therefore generally believed they would be disadvantaged in their dealings with both lawyers and the justice system.[47]

Under the *Labour Relations Act 1987* special personal grievance procedures were established for employees who took a complaint of sexual harassment against their employer or a co-worker.[48] These procedures permitted a mediator to take more of an inquisitorial role. The complainant and respondent would be heard individually by the mediator. Complainants could have their support organisation with them, and usually did, but it was never necessary for the harassed worker to face the harasser.[49]

Alternatively, the complainant could choose[50] to take a complaint of discrimination on the grounds of gender to the Human Rights Commission under the *Human Rights Commission*

[46] Ibid. 'Women emphasised as well that while the justice system is largely remote from their everyday lives, the problems which lead to their need to interact with it are very often central to their lives. The most commonly mentioned problems were those relating to family relationships (especially relationship breakdowns), the care and protection of children, income and child support, violence against women, other criminal conduct by family members, and employment.'

[47] Ibid 49. 'Women knew that lawyers and, especially, senior lawyers and judges are mainly men. The message they took from this was that attitudes and practices within the legal profession are not conducive to women lawyers' advancement.'

[48] *Labour Relations Act 1987*, s 221. Special procedures where sexual harassment alleged – Where a personal grievance involves allegations of sexual harassment:

(a) Any grievance committee shall, if the worker so requires, consist of one person, being either:
  (i) A person (who may be a mediator) mutually agreed on by the parties; or
  (ii) If there is no such agreement, either a mediator or a person appointed by a mediator; and
(b) The person or persons constituting the grievance committee may, before or after hearing the parties, conduct an investigation into the grounds of the personal grievance, but shall ensure that all parties have an opportunity to be heard regarding the findings of that investigation; and
(c) Neither the grievance committee nor the Labour Court shall take into account any evidence of the worker's sexual experience or reputation; and
(d) Subject to paragraphs (a) to (c) of this section, the procedure otherwise applicable in respect of that grievance shall apply.

[49] Wendy Davis, *A Feminist Perspective on Sexual Harassment in Employment Law in New Zealand*, New Zealand Institute of Industrial Relations Research (1994).

[50] *Labour Relations Act 1987*, s 226(1) (emphasis added); Where the circumstances giving rise to a personal grievance by a worker are also such that that worker would be entitled to make a complaint under the Human

Act 1977.[51] The Commission did not at that time encourage a person to have the support of a union or other representative during an investigation. The impact of this was that an employee frequently felt vulnerable and unsupported when making a personal complaint to a stranger.[52] A 1991 Ministry of Women's Affairs study indicated that most women subjected to sexual harassment preferred to utilise the *Labour Relations Act 1987* personal grievance procedure.[53]

Under the *Employment Contracts Act 1991* it was still possible to take a personal grievance on the grounds of sexual harassment, however, the special procedures for hearing those complaints were removed.[54] The then Minister of Women's Affairs, Jenny Shipley, requested that the Minister of Labour revise the Act and reintroduce the special procedure for sexual harassment cases. This request was refused.[55] The alternative of a complaint under the *Human Rights Commission Act 1977* and subsequently the *Human*

Rights Commission Act 1977 or the Race Relations Act 1971, the worker may take **one but not both** of the following steps:

(a) The worker may invoke, in relation to those circumstances, the procedures applicable in relation to personal grievances under this Act or the relevant award or agreement:

(b) The worker may make, in relation to those circumstances, a complaint under the Human Rights Commission Act 1977 or the Race Relations Act 1971.

[51] *Human Rights Commission Act 1977*, s 15. See John Hughes et al, *Personal Grievances* (2005) 9.1. Section 15 'prohibited employers from subjecting employees to any detriment "by reason of the sex… of that person."' In *H v E* (1985) 5 NZAR 333 the Equal Opportunities Tribunal decided that sex discrimination resulting in disadvantage included sexual harassment. This case was applied in later cases. See Chapter 2.4.5 and 2.4.6.

[52] Wendy Davis, *A Feminist Perspective on Sexual Harassment in Employment Law in New Zealand* (New Zealand Institute of Industrial Relations Research, 1994).

[53] Lesley Haines, Director, Policy for Chief Executive, Ministry of Women's Affairs, Briefing Paper for the Minister, *Sexual Harassment Procedures – Employment Contracts Act*, 14 August 1991, 1. For a summary of the issues surrounding sexual harassment in the workplace, see Wendy Davis, *A Feminist Perspective on Sexual Harassment in Employment Law in New Zealand*, New Zealand Institute of Industrial Relations Research (1994). This contains an extensive bibliography on the subject. See also John Hughes et al, *Personal Grievances* (2005), ch 9.

[54] *Employment Contracts Act 1991*, Part III Personal Grievances, s 29 Sexual harassment. Section 26(e) explained that an application must choose between bringing a personal grievance under the *Employment Contracts Act* or making a complaint under the *Human Rights Commission Act* – later the *Human Rights Act*.

[55] Lesley Haines, Director, Policy for Chief Executive, Ministry of Women's Affairs, Briefing Paper for the Minister, *Sexual Harassment Procedures – Employment Contracts Act* (14 August 1991) 1. Letter of Minister of Women's Affairs to Minister of Labour (26 October 1991).

Rights Act 1993 remained.[56] This involved the Human Rights Commission Complaints Division either conciliating or investigating a complaint and the Commission determining the substance.[57] However, it is submitted that there would have been some justification for women believing that their right to have special personal grievance procedures for dealing with sensitive matters in the most appropriate manner had been unjustifiably removed, thus restricting their access to arguably more effective and timely justice options in these circumstances.

Whilst access to justice needs to be complete, this does not suggest that there should be an open-ended entitlement to representation and unfettered access to the legal process.[58] Equal access to justice is a laudable ideal but there are competing interests between individual and party rights, those of the state and the balance of financial constraints on the Government.[59] As fiscal limitations impact on the quantity of assistance available the question then arises as to what quality of services should be provided and in what circumstances, to satisfy the principle or notion of equitable access to justice.[60] Harris has questioned whether *reasonable* access is enough or whether the obligation should be to provide the best possible access.[61] Even if the state provided reasonable access to all

[56] *Human Rights Act 1993*, s 62. Section 75 sets out the functions of the Complaints Division of the Human Rights Commission under this Act.
[57] Ibid, s 75.
[58] Sir Ivor Richardson, 'The Courts and Access to Justice' (2000) 31 *Victoria University of Wellington Law Review* 163, 167; 'In *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446, 448, Lord Roskill commented that "[l]itigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."'
[59] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] *New Zealand Law Review* 282, 308.
[60] Ibid.
[61] Ibid.

people there would still remain those at the 'top end' who would have access to the 'best' resources because of their ability to fund a higher level of service themselves.[62]

3.2.2 THE CONTEXT OF ACCESS TO JUSTICE ISSUES UNDER *THE EMPLOYMENT CONTRACTS ACT 1991*

In the early 1980s the New Zealand economy was in a 'perilous position'.[63] Changes in the traditional agricultural trading base resulting from Britain's entry into the European Economic Community, rampant inflation, and external crises such as the fallout from the 1973 oil shock all impacted on New Zealand's economic development.[64]

The 1980s was thus a period of significant economic deregulation under the Labour Government, which saw the removal of most state market regulation and trends 'expanding the scope for market mechanisms to ensure efficient allocation of resources.'[65] For example, the Public Service was restructured and in some parts corporatized along business lines and agricultural subsidies were removed.[66] Despite these reforms, the New Zealand economy continued to perform poorly, which some parties blamed on the

[62] 'State supported aid arises from the basic responsibility of the state to ensure justice for its citizens, and this responsibility is not truly fulfilled as long as any citizen is prevented by lack of means from having his grievances aired and determined fairly and adequately by the courts… Article 7 of the Universal Declaration of Human Rights… requires that the balance of justice should not be loaded in favour of the man with means, the large corporation or the state itself.' Rt Hon J R Marshall, NZPD vol 363, 1969, 2680, cited in Joanne Morris, *Women's Access to Legal Services: Women's Access to Justice, He Putanga Mo Nga Wahine Ki Te Tika* (1999) 125.

[63] Nick Wailes, 'Professor Richard Epstein and the New Zealand Employment Contracts Act: A Critique', (1997) 28 *California Western International Law Journal* 27, 28.

[64] Brian Easton, 'The Commercialisation of the New Zealand Economy: From Think Big to Privatisation' in Brian Easton (ed), *The Making of Rogernomics* (1989) 114, 120.

[65] Nick Wailes, 'Professor Richard Epstein and the New Zealand Employment Contracts Act: A Critique', (1997) 28 *California Western International Law Journal* 27, 29. See also Brian Easton, 'The Commercialisation of the New Zealand Economy: From Think Big to Privatisation' in Brian Easton (ed), *The Making of Rogernomics* (1989); Patrick Massey, *New Zealand: Market Liberalization in a Developed Economy* (1995).

[66] Many government departments were 'corporatized' and expected to make a profit or operate along business lines.

continued involvement of the state in the labour market.[67] The New Zealand Employers' Federation and the New Zealand Business Roundtable, a lobby group advocating the interests of large private companies, believed that the reform process had not gone far enough and thus they waged a public campaign lobbying the Labour Government and the opposition National Party to go further and deregulate the employment market.[68]

The Labour Government did not attempt to reform the labour market until the passage of the *Labour Relations Act 1987*. This was an attempt to increase the flexibility of the labour market but also to ensure that employment protections remained in force. For example, existing personal grievance rights for employees who claimed unjustifiable dismissal or disadvantage and the procedure and fundamental principles derived from extant case law, remained largely unchanged.[69]

The Business Roundtable however, continued to lobby the Labour Government and from 1990 the National Government, on the need for further labour market reform. Their arguments were largely based on theories promulgated by Professor Richard Epstein[70] and an alternative employment model based on orthodox legal contractual theory and

[67] Nick Wailes, 'Professor Richard Epstein and the New Zealand Employment Contracts Act: A Critique', (1997) 28 *California Western International Law Journal* 27, 30.
[68] Ibid 31. He argues 'the failure of the economic reforms introduced by Labour during the second half of the 1980s could be largely attributed to the failure to reform the labor [sic] relations system.'
[69] *Labour Relations Act 1987*, s 216. See Gordon Anderson, 'Interpreting the Employment Contracts Act: Are the Courts Undermining the Act?' (1997) 28 *California Western International Law Journal* 117, 118 and 135. These procedures and principles also remained under the *Employment Contracts Act 1991* despite new-right arguments that they contravened the principles of 'freedom on contract'. 'Unlike collective bargaining, where the legal issues were based on novel legislation, the unjustified dismissal provisions have existed in legislation since 1973, with case law well developed by 1991.'
[70] Richard Epstein was at the time Professor of Law at the University of Chicago and wrote widely on legal subjects. He was a particular supporter of the principle of employment at will as he believed that both parties to an employment contract are equal and had the capacity to enter into or break a contract of employment when they chose. See, Nick Wailes, 'Professor Richard Epstein and the New Zealand Employment Contracts Act: A Critique', (1997) 28 *California Western International Law Journal* 27; Ellen Dannin, 'Confronting the Employment Contracts Act' (1997) 28 *California Western International Law Journal* 1, 5.

associated principles.[71] On the basis of accepting the notion that freedom of contract and freedom of association would improve efficiency in the labour market, the National Government introduced the Employment Contracts Bill in December 1990 with very little prior consultation or involvement of interested groups. It was enacted in 1991 amidst strong opposition by members of the public and unions.[72] Although Epstein's theories were reflected strongly in the *Employment Contracts Act 1991*, the Business Roundtable was unsuccessful in achieving one of Epstein's fundamental employment principles, that of employment 'at will' with no personal grievance restriction, nor was the Business Roundtable successful in dispensing with the specialist employment institutions.[73]

The successful introduction of the principles of freedom of association and freedom of contract reversed almost 100 years of employment law[74] that had been protective of unions and unionisation.[75] New Zealand's high rates of union membership (60–70 percent)

[71] See, for example, Margaret Wilson, Law Professor, University of Waikato, 'Employment Court – Trends, Statistics, Legislative Update', Paper to Employment Law Conference, New Zealand Law Society, Wellington, 19 November 1998, 4.
This model was developed for the Business Roundtable by Penelope Brook, who was employed by them as a senior policy adviser: See Nick Wailes, 'Professor Richard Epstein and the New Zealand Employment Contracts Act: A Critique', (1997) 28 *California Western International Law Journal* 27, 31, for references to Penelope Brook's views on the subject. Wailes believed that Epstein's writings were pivotal to the development of New Zealand employment law policy as a result of the Business Roundtable's vigorous lobbying of the National Government from 1990.

[72] Ellen Dannin, 'Confronting the Employment Contracts Act' (1997) 28, *California Western International Law Journal* 1, 5–6. Opposition to the Employment Contracts Bill included strike action and demonstrations. Dannin said that nearly one-sixth of New Zealand's population demonstrated or struck against it.

[73] Gordon Anderson, 'Interpreting the Employment Contracts Act: Are the Courts Undermining the Act?' (1997) 28, *California Western International Law Journal* 117, 120 and 141. Ironically, the *Employment Contracts Act 1991* actually extended the jurisdiction of the specialist court to cover 'all legal actions arising out of the employment relationship' and 'created a truly specialist labour court covering all employees. In many respects this represented a double defeat for the new-right. Not only was the specialist court retained, but its jurisdiction was enhanced to cover common law actions based on the contract of employment. The new-right argues that common law actions are best dealt with by the courts of general jurisdiction which are less prone to judicial "activism" and more likely to remain guided by strict contractual rules.'

[74] See, Labour Select Committee Report, 'Report of the Labour Committee on the Inquiry into the Effects of the *Employment Contracts Act 1991* on the New Zealand Labour Market', 21 September 1993, 5, Introduction, para 3.1. 'Although there had been a number of significant changes in industrial legislation from the early 1980s, the Act marked a sharp break from underlying concepts and practices of labour market organisation in the previous 100 years.'

[75] Ellen Dannin, 'Confronting the Employment Contracts Act' (1997) 28 *California Western International Law Journal* 1, 6.

dropped by more than 30 percent in the four and a half years after the *Employment Contracts Act 1991* came into force.[76] The ability of employees 'to choose any representative or no representative' also meant that if they left the union they would be responsible for meeting the cost of representation themselves.[77] For an employee on a low income this 'choice' was of limited practical value[78] and would in some cases significantly restrict access to justice.

Access and other equity concerns had arisen relatively soon after the introduction of the *Employment Contracts Act 1991* and continued to be voiced until 1998. In 1993 the Labour Select Committee undertook an inquiry into the effects of the *Employment Contracts Act 1991* on the New Zealand labour market.[79] An overwhelming concern for those using the Employment Tribunal was the significant delay experienced between filing a case and being allocated a hearing date.[80] Some unions took an overarching view that the power balance had shifted in favour of employers and that long waiting times had a negative impact on equity and caused additional stress.[81] Employment Tribunal members and union officials informed the inquiry of their view that the provision in section 76 of the *Employment Contracts Act 1991* to provide 'speedy resolution' of disputes was not being met.[82]

[76] Ibid.
[77] Ibid. See also Chapter 7.4.1.
[78] Ibid, gives an example of a submission written on the Employment Contracts Bill by a grocery store worker, who said, 'Of course, it depends on who I can afford to hire, and as a family we struggle now, even cutting groceries back.'
[79] See Labour Select Committee, 'Report of the Labour Committee on the Inquiry into the Effects of the Employment Contracts act 1991 on the New Zealand Labour Market', September 1993.
[80] Ibid 39.
[81] Ibid.
[82] Ibid 40. See below para 3.4.2 for detailed discussion on reasons for the delays. See also, Chapter 6.4.10.

One factor contributing to delay was the impact of the increased use of lawyers and advocates at hearings, which may also have contributed to complaints of increased legalism and formality in the Tribunal.[83] The *Employment Tribunal Regulations* themselves also gave a perception of increased legalism and formality that was demonstrably at odds with the intention of the Act by imposed time limits and delays in the process.[84] The lack of a *de novo* appeal in the Employment Court meant that all potential evidence and arguments had to be adduced and recorded at the Employment Tribunal, which protracted hearings.[85]

The 1996 election resulted in a coalition between New Zealand First and National. As part of the Coalition Agreement a *Statement on Industrial Relations* was issued which included a commitment to review the operations of the Employment Tribunal and the Employment Court. The review proposed to determine whether parties were being denied access to justice because of delays, lack of resources, increased legalism, formality and lengthy waiting lists; particularly in the area of personal grievances.[86] All these identified factors contributed to concerns about increased costs and the ability of parties to access the procedure.[87]

The 1996 Coalition Government produced an *Industrial Relations Package* in an attempt to try and resolve some of the identified issues. The Package proposed amendments to the

[83] Labour Select Committee, 'Report of the Labour Committee on the Inquiry into the Effects of the *Employment Contracts Act 1991* on the New Zealand Labour Market', September 1993, 41.
[84] Ibid 42. See also, W F Birch, Minister of Finance, Speech to Wellington District Law Society, 7 June 1997, 7; 'Some say the process has become more legalistic, turning on complex distinctions which are difficult to apply in the day to day practice of industrial relations.'
[85] Ibid 43.
[86] John Hughes, 'The Employment Court, "Judicial Activism", and the Coalition Agreement', (1997) 28 *California Western International Law Journal* 167, 172–180. These topics are explored further in this chapter.
[87] W F Birch, Minister of Finance, Speech to Wellington District Law Society, 7 June 1997, 7.

personal grievance provisions of the *Employment Contracts Act 1991* to clarify probationary employment, contributory fault and the standard of conduct required by the employer when dismissing employees. It also proposed removing the available alternative common law 'wrongful dismissal' option.[88] To allay some concerns, a commitment was given to maintaining the specialist employment jurisdiction[89] but questions of equitable access to justice were not directly dealt with in the *Industrial Relations Package*. The issue of adequate resourcing of the Employment Tribunal and Employment Court was also discussed. However, due to the Coalition Government losing power no fundamental changes arose.[90]

3.2.3 Access to Justice in the Context of the Principles and Intentions of the *Labour Relations Act 1987* and the *Employment Contracts Act 1991*

The *Labour Relations Act 1987* was designed, amongst other things, to 'provide procedures for the orderly conduct of relations between workers and employers'[91] and it gave access to personal grievance procedures largely based upon union membership.[92] The procedure for resolving personal grievances under the *Labour Relations Act 1987* is outlined in Chapter Two.[93] Ellen Dannin suggests that the intention of the Act was to create effective working relationships between employers, employees and unions.[94] In

[88] Ibid 7–8.
[89] There were questions, however, about whether this was a conditional commitment as a fuller review of court structures was intended to be carried out by the Minister of Justice. See, John Hughes, 'The Employment Court after the Industrial Package', 24(1) NZJIR 21, 28.
[90] *Mazengarb's Employment Law*, ERA P9.6.
[91] *Labour Relations Act 1987*, Preamble (b).
[92] Ibid, s 209(d); 'Access to personal grievance procedure is a benefit of union membership, except in certain limited circumstances and is not dependent on coverage by an award or agreement.' See also s 216 *Labour Relations Act 1987* 'Right to use personal grievance procedures 'particularly s 216 (3) exemption of young workers not under union coverage.
[93] See Chapter 2.2.2–2.2.5.
[94] Ellen Dannin, 'Contracting Mediation: The Impact of Different Statutory Regimes' (1999) 17 *Hofstra Labor and Employment Law Journal* 65, 70.

practice this meant access to personal grievance procedures was restricted to union members who were covered by an award or agreement or whose work was covered by an award or agreement.[95] Those outside this coverage or those who applied for exemption from compulsory union membership under an 'unqualified preference' provision, could not access the personal grievance provisions and were required to take a common law action for wrongful dismissal.[96] Access to justice was therefore limited depending on the employee's membership of a union.[97] This limited coverage fell short of international standards, such as the ILO Conventions on the termination of employment which did not 'seem to envisage protection for only limited groups of workers.'[98] However, in New Zealand access to the personal grievance procedure for unjustifiable dismissal is available from the first day of employment. In most other jurisdictions, claims for wrongful dismissal are not available to employees until they have completed a qualifying period of employment. For example, at the time in the United Kingdom an employee must have completed two years' service with the same employer.[99]

Changes to the industrial relations court structure under the *Labour Relations Act* altered the function of courts in industrial relations matters principally by the creation of a specialist Labour Court, which became a court of record rather than one of conciliation and

[95] *Labour Relations Act 1987*, s 216. Examples of those who might have been outside this coverage included managerial classes, those earning above the maximum wage where award coverage ceased, emerging occupations not yet organised by union coverage, and some professionals, such as more senior lawyers and accountants in the private sector.
[96] Ibid, ss 82, 83. The only grounds for exemption under s 83 were that 'the applicant genuinely objects, on the grounds of conscience or other deeply held personal conviction, to becoming or remaining a member of any union whatsoever or of a particular union.' See Chapter 2.2.2 for discussion on the *Labour Relations Act 1987*.
[97] John Hughes, 'Personal Grievances' in Raymond Harbridge (ed) *Employment Contracts: New Zealand Experiences* (1993) 89.
[98] G Anderson, 'The Origins and Development of the Personal Grievance Jurisdiction in New Zealand' (1988) 13 NZJIR 257, 263 and 272.
[99] S Corby, 'Resolving Employment Disputes: Lessons from Great Britain?' (1998) 23 NZJIR 153, 155.

arbitration.[100] This change came about because of problems identified with the previous *Industrial Relations Act 1973,* in particular 'delays in Court hearings and the alleged tendency for greater legalism and focus on technical detail.'[101] Despite this, Ryan and Walsh believed this new status actually resulted in greater formality and legality than under previous legislation.[102] They suggested that the influence of 'practical reality' on legal principles was reduced from that time.[103]

The passage of the *Employment Contracts Act* in 1991 was an attempt to address some of the problems which existed under the *Labour Relations Act 1987*. In particular, the former sought to change the philosophical background to the employment relationship by placing more emphasis on the 'purely' contractual relationship between employer and employee.[104] These changes took place in the context of wider economic and social reforms 'aimed at radical change in the welfare state.'[105] The *Employment Contracts Act 1991* was intended to broaden the principles of freedom of association and freedom of representation.[106] However, as Dannin explained, the so called 'even-handed' approach to selecting a representative of choice:[107]

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[100] *Labour Relations Act 1987*, s 278. See Rose Ryan and Pat Walsh, 'Common Law v Labour Law: the New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 234, citing John Hughes, *Labour Law in New Zealand* (1990) Vol I, para 9.30. See also discussion in Chapter 2.2.2.

[101] Rose Ryan and Pat Walsh, 'Common Law v Labour Law: the New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 233. See also Gordon Anderson, 'The Origins and Development of the Personal Grievance Jurisdiction in New Zealand' (1988) 13 NZJIR 257, 271 and 273; discussing submissions to the Green Paper on Industrial Relations Reform (Department of Labour, 1985) he said that 'procedural problems and delays in the procedure [under the *Industrial Relations Act 1973*] were identified as areas of concern in many submissions.'

[102] Rose Ryan and Pat Walsh, 'Common Law v Labour Law: the New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 234.

[103] Ibid. 'Thus, the changes made by the Labour Relations Act gave rise to a considerably more formal and legally based system than in the past.'

[104] *Employment Contracts Act 1991*, Preamble.

[105] Ellen J Dannin, *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act* (1997) 106. This Economic and Social Initiative saw welfare benefits significantly reduced and punitive provisions introduced against people who turned down offers of employment of at least minimum wage.

[106] Max Bradford, MP, 'The Future of the Employment Court and Tribunal: The Government View', Speech Notes to New Zealand Institute of Industrial Relations Research Seminar, 23 April 1993, 5. See also, Ellen J Dannin, *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act* (1997) 267.

> fail[ed] to appreciate and account for significant differences between employees and employers. Laws which apply equally but which fail to account for relevant differences may not be equal in impact or effect. Thus the ECA legislate[d] for equality while it ignore[d] background inequality.

William Birch, the then Minister of Labour, in his Report Back speech to Parliament on the Employment Contracts Bill, said that the new institutional framework would 'provide easy, quick and inexpensive access for all New Zealanders to pursue personal grievance procedures where necessary.'[108] The National Government's intention was that the system would be 'more democratic and will be a vast improvement on the slow, selective and cumbersome procedures which they replace'[109] and would provide equitable access[110] to 'procedures and outcomes that are considered reasonable and fair by society as a whole.'[111] The ability for all employees, according to Minister Birch, regardless of union membership, to access the personal grievance machinery promised 'a wider and more accessible process of personal grievances.'[112] Thus in theory and expressed government intent, the principles behind the *Employment Contracts Act 1991* were said to provide access to justice for all employees as opposed to the limitations which had existed under the *Labour Relations Act 1987* and preceding legislation.[113]

'The ECA even-handedly allows an employee or an employer to select a representative to perform any acts related to negotiating or enforcing employment contracts or prosecuting statutory violations.'

[107] Ellen J Dannin, *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act* (1997) 267.

[108] W F Birch, Minister of Labour, 'Report Back Speech: Employment Contracts Bill' (22 April 1991) 4. This objective was set out in *Employment Contracts Act 1991*, s 76, Part VI, Objects; 'to establish… a low level, informal, specialist Employment Tribunal to provide speedy, fair and just resolution of differences between parties to employment contracts, it being recognised that in some cases mutual resolution is either inappropriate or impossible.'

[109] Ibid.

[110] Max Bradford, 'Report of the Labour Committee on the Employment Contracts Bill' (April 1991) Appendix I, 1.

[111] Max Bradford, 'The Future of the Employment Court and Tribunal: The Government View', Speech Notes to New Zealand Institute of Industrial Relations Research Seminar, 23 April 1993, 7.

[112] W F Birch, Minister of Labour, 'Second Reading Speech: Employment Contracts Bill' (1991).

[113] Max Bradford, 'The Future of the Employment Court and Tribunal: The Government View', Speech Notes to New Zealand Institute of Industrial Relations Research Seminar, 23 April 1993, 7. 'No longer would employees covered by collective and individual employment arrangements come under different legal jurisdictions. All were to have the same rights, and to have access to the same legal remedies.'

Prior to the passage of the *Employment Contracts Act 1991* employees were generally represented by unions in personal grievance actions, either by union employees, or by counsel or advocates contracted by the unions. Employers may have been represented by employers' organisations or by contracted advocates or counsel. In practice, the involvement of lawyers had not been commonplace. The *Employment Contracts Act 1991* allowed employee and employer parties to choose the representation they wished.[114] This, combined with the reduction in union membership and influence, meant that more legal counsel became involved in employment law matters.[115] As a result, whilst there may have been a numerical increase in those able to access the process this did not necessarily translate into greater actual accessibility. As will be discussed in more detail later in this chapter, the fundamental problems associated with access to justice – cost, delay and process – continued. Despite the comments made earlier regarding the legal nature of procedures applying under the *Labour Relations Act 1987*, users of the personal grievance adjudication system under the *Employment Contracts Act 1991* later fondly looked back on the relative informality of proceedings under the previous Act.[116] Many adjudicators laid part of the responsibility for increased formality, legalism, cost and delay on the greater use of legal representation as well as the influence of the more formal *Employment Tribunal Regulations 1991*.[117] Lorraine Skiffington saw the greater use of legal representatives as being a predictable result of the establishment of an employment

[114] *Employment Contracts Act 1991*, s 59.

[115] Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55, 56. 'Research by JP Thomson confirmed that there has been an increase in the number of lawyers appearing before the Tribunal, and a decrease in the involvement of both union advocates and organisers. The growing reliance on lawyers and advocates has been exacerbated by the de-emphasis on collective bargaining and the diminishing role of unions. As one senior Tribunal member pointed out when replying to employer criticisms of the increasing presence of lawyer representation, with unions out of the picture who else did you expect would represent the employees? Where else could they go?'

[116] See, generally, Ralph Gardiner, 'Fronting Up – Some Thoughts about Representation' (1994) 8 ELB 114; W R C Gardiner, 'The Employment Tribunal (A Report from the Trenches)' 13 May 1998. See also, adjudicators' comments in Chapter 6.4.1 See also Chapter 7.6.4 for representative views on an ideal procedure.

[117] See also, adjudicators' comments in Chapter 6.4.1 and Chapter 7.6.4.

relationship based more on strict contractual principles.[118] As union representation was used less frequently, employees had to find some other form of representation to protect their most valued asset, their employment status.[119] It has been suggested that the prevailing economic circumstances including high unemployment and a depressed economy meant it was unlikely that employees would be satisfied with a 'low-level' process to resolve employment problems.[120]

3.3 NATURAL JUSTICE SUMMARISED

3.3.1 INTRODUCTION

Natural justice is a general public law principle which binds administrative bodies and decision makers and imposes a duty amongst other factors, to act fairly and to listen to both sides of any dispute.[121] The absence of natural justice in any decision of an administrative authority may be grounds for an application for judicial review of that decision. Where natural justice is not imposed by statute 'the justice of the common law will supply the omission of the legislature.'[122] The requirements of natural justice will vary

[118] Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55, 56. See also, Ralph Gardiner, 'Fronting Up – Some Thoughts about Representation' (1994) 8 ELB 114; Ellen Dannin, 'Contracting Mediation: The Impact of Different Statutory Regimes', (1999) 17/1 *Hofstra Labor & Employment Law Journal* 65, 97–98. 'In debates on the ECA, MP Ian Revell praised what he anticipated would be the informality and accessibility if the ECA and said that the Government was not interested in providing a "lawyers' feast". Of course, it did just that. New representatives were attracted to mediation as a lucrative new source of income.'

[119] See discussion at para 3.2 above, and E J Dannin, 'Confronting the Employment Contracts Act' (1997) 28 *California Western International Law Journal* 1, 2.

[120] Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55, 56: 'With everything to lose (but probably already lost), they have invariably chosen to pursue financial compensation by legal means, and in doing so, have defeated the Act's intention to maintain a low-level system of dispute resolution.'

[121] The rules of natural justice bind administrative authorities to 'act in good faith and fairly listen to both sides'; *Board of Education v Rice* [1911] AC 179, 182, Lord Loreburn (HL). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 847.

[122] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194, Byles J. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 847.

depending on the type of procedure involved, the nature of the decision being made and the body making the decision.[123]

The principles or rules of natural justice have been developed over the centuries in the common law and relate to the conduct of processes which courts and tribunals use in their operation.[124] For a period, the principles were given a very rigid conceptual application[125] but this narrow approach was abandoned following *Ridge v Baldwin*[126] and *Durayapph v Fernando,*[127] where Lord Upjohn indicated that the principles could be applied 'upon the most general considerations.'[128] Originally only judicial or quasi-judicial decisions were subject to the principles of natural justice, however, the modern approach is that if rights or interests are affected a decision will be subject to natural justice principles.[129]

The *New Zealand Bill of Rights Act 1990* states that every person 'has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations,

[123] *Jeffs v NZ Dairy Production Marketing Board* [1967] NZLR 1057 (PC) – natural justice may operate at many different levels. See also *Birss v Secretary for Justice* [1984] 1 NZLR 513, 516 (CA); *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 848. For a discussion of when the principles of natural justice are likely to apply and the factors to determine this, see G D S Taylor, *Judicial Review* (1991) 254 and following.

[124] For early examples see *James Baggs Case* (1615) 77 ER 127; *Cooper v Wandsworth Board of Works* (1863) 143 ER 414. See also, G D S Taylor, *Judicial Review* (1991) 251–252. For a discussion on the history of the principles of natural justice and their relationship to procedural fairness see, generally, Lord Woolf, Jeffrey Jowell, Andrew P Le Seuer, *De Smith, Woolf and Jowell's Principles of Judicial Review* (1999). See also, G D S Taylor, *Judicial Review* (1991) 251. Note, the common law is the law derived from judicial decisions as opposed to statute; P Spiller, *Butterworths New Zealand Law Dictionary* (5th ed, 2002) 53. As Anne Boyd, *Procedural Fairness in Performance Dismissals*, NZ Council of Trade Unions, Occasional Papers on Employment Law, August 1997, 6, said, it therefore develops and evolves incrementally and 'is never perfectly static.'

[125] See, for example, *R v Electricity Commissioners* [1924] 1 KB 171.

[126] [1964] AC 40 (HL).

[127] [1967] 2 AC 337 (PC).

[128] [1967] 2 AC 337, 349 (PC).

[129] See, for example, Lord Scarman in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 407 (HL) said that the Courts had extended 'the requirements of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act.' For a New Zealand example, see *Stininato v Auckland Boxing Association Inc* [1978] 1 NZLR 1 (CA). See GDS Taylor, *Judicial Review* (1991) 251–254.

or interests protected or recognised by law.'[130] The *Bill of Rights Act* has limited effect as it applies only to the three arms of government[131] and it is subordinate legislation,[132] however, the rules of natural justice are so deeply entrenched in the common law that they have been held to apply in a wide range of circumstances.[133]

The rules of natural justice apply in different ways to various aspects of this thesis. Natural justice was incorporated into the common law contract of employment by the 1985 Court of Appeal decision in *Auckland Shop Employees IUW v Woolworths.*[134] Natural justice or procedural fairness was incorporated as a key element of an employer's disciplinary

[130] *New Zealand Bill of Rights Act 1990*, s 27(1).
[131] Executive, legislature and judiciary.
[132] *New Zealand Bill of Rights Act 1990*, ss 4, 5 and 6 limit the application of the Act in that other legislation may supersede it if they are inconsistent:
4. Other enactments not affected –
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),–
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment –
by reason only that the provision is inconsistent with any provision of this Bill of Rights.
5. Justified limitations –
Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
6. Interpretation consistent with Bill of Rights to be preferred –
Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.
Although the Bill of Rights is not entrenched it is likely that Parliament would experience difficulty dispensing with the right to natural justice. See *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (CA).
[133] The Privy Council has said that the *Bill of Rights Act* 'reinforces' the common law; *Manakau City Council v Ports of Auckland Ltd* [2000] 1 NZLR 1, 14. See also, *Lumber Specialists Ltd v Hodgson* [2000] 2 NZLR 347, 375, where Hammond J said that s 27(1) was 'exceptionally important' and should be interpreted broadly. In *Simpson v Police* (High Court, Hamilton, AP 58/91, 17 June 1993) 13, Hammond J said that taking a narrow view of the term 'natural justice' under the *Bill of Rights Act* would be 'hopelessly wrong'. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 848; Anne Boyd, *Procedural Fairness in Performance Dismissals*, NZ Council of Trade Unions, Occasional Papers on Employment Law, August 1997, 10, argues that the principles have acquired a significant constitutional status.
[134] *Auckland Shop Employees IUW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 858. The Court of Appeal 'established that it was an implied term of the employment contract that any inquiry into alleged employee dishonesty or incompetence must be conducted in a fair and reasonable manner.' See also, G D S Taylor, *Judicial Review* (1991) 270, para 13.21. 'Courts in New Zealand… have not hesitated to apply the same principles… to offices and contracts of employment alike.'

enquiry by the Court's interpretation of 'unjustified' dismissal in *Auckland City Council v Hennessey*.[135] Later, as a statutory requirement it related to how the Employment Tribunal dealt with its cases and allowed judicial review of Employment Tribunal decisions on the grounds of procedural impropriety or bias.[136]

3.3.2 PRINCIPLES OF NATURAL JUSTICE DEFINED

There are two central tenets of natural justice which form the basis of the principles to be applied.[137] Firstly, the *audi alteram partem* rule, that no person may be condemned unheard, means that all parties must have an opportunity to present their case and to be heard by the decision maker before any decision is reached.[138] Secondly, the *nemo judex in causa sua* rule, or the rule against bias, that no person should be a judge in their own cause, means a neutral decision maker should determine the outcome.[139] The application of these rules could mean, for example, that a decision may be substantively correct but may

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[135] *Auckland City Council v Hennessey* [1982] ACJ 699 (CA).

[136] *Employment Contracts Act 1991*, s 105, '**Applications for review** – (1) If any person wishes to apply for review under Part I of the Judicature Amendment Act 1972, or bring proceedings seeking writ or order of, or in the nature of mandamus, prohibition, or certiorari, or a declaration or injunction, in relation to the exercise, refusal to exercise, or proposed or purported exercise by –

(a) the Tribunal; or
(b) An officer of the Tribunal or the Court; or
(c) An employer, or that employer's representative under this Act; or
(d) An employee, or that employee's representative under this Act, –

of a statutory power or statutory of decision (as defined by section 3 of *the Judicature Amendment Act 1972*) conferred by or under this Act or the *State Sector Act 1988*, the provisions of subsections (2) to (4) of this section shall apply.' Section 105(3) required that the right of appeal under this Act had to be exhausted before seeking judicial review. Under s 131 parties could apply to have proceedings before the Employment Court reviewed in the Court of Appeal. There could be no appeal from that decision – s131(4).

[137] Described as the 'two cardinal principles' by *Brookers Employment Law*, ER173.04.

[138] 'Hear the other side'. Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 860. See also, G D S Taylor, *Judicial Review* (1991) 276, para 13.30 and following. To deny the opportunity to make submissions can be a breach of natural justice. See for example, *R v Secretary for the Home Department, ex p Doody* [1994] 1 AC 531 (HL). See, G D S Taylor, *Judicial Review: A New Zealand Perspective* (Supplement to the First Edition, 1997).

[139] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 874. The rule against bias is 'not concerned to uphold procedural fairness' but 'requires general impartiality in decision making'. A decision maker who is biased is disqualified from making a decision unless the bias is disclosed and the parties waive their right to object. Bias may be actual or apparent. See also, G D S Taylor, *Judicial Review* (1991) 286, para 13.46 and following.

be set aside for want of procedural fairness.[140] Any distinction between the concept of natural justice and the concept of 'fairness' no longer exists.[141] In the words of Lord Morris:[142]

> Natural justice is but fairness writ large and juridically. It has been described as fair play in action.

The New Zealand courts are prone to approach natural justice in a pragmatic way, using a balanced assessment according to the circumstances of the case rather than a legalistic and theoretical approach.[143] It has been stated that the significance of the case to the parties concerned will be a major factor in the level of the requirement to observe the principles of natural justice:[144]

> The level of the requirement to observe the standards of natural justice must reflect the significance and consequences of the relevant decision to those affected by it. Where the decision-making body is effectively capable of denying someone their livelihood, then the requirements of natural justice will be of a high order. Where no such weighty matters turn on the decision, less stringent standards are appropriate.

3.3.2(A) AUDI ALTERAM PARTEM – THE RIGHT TO A HEARING

a) Notice

The requirement to provide prior notice of a hearing incorporates three main factors. First, there must be notice of the time, date and place of the meeting itself. Second, adequate notice must be given of the issues to be decided, in sufficient detail for the receiving party

[140] *Board of Education v Rice* [1911] AC 179, 182 (HL) Loreburn LJ. The principles of natural justice impose a duty to 'act in good faith and fairly listen to both sides.'
[141] See, G D S Taylor, *Judicial Review* (1991) 252–254, paras 13.02 and 13.03. 'The terms "fairness" and "natural justice" are used interchangeably to protect rights or expectations that are not repugnant to a particular statute or to the law.'
[142] *Furnell v Whangarei High School Board* [1973] 2 NZLR 705, 718. See, G D S Taylor, *Judicial Review* (1991) 252–254, paras 13.02 and 13.03.
[143] *Re Erebus Royal Commission* [1981] 1 NZLR 614, Woodhouse, McMullin JJ. See also, *Russell v Duke of Norfolk* [1949] 1 All ER 109, 188, Tucker LJ; 'the requirements of natural justice must depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.'
[144] *Auckland Boxing Association v New Zealand Boxing Association* [2001] NZAR 847, 859, Priestly J.

to be able to respond;[145] including any allegations or charges made;[146] and any potential outcomes or orders to be made.[147] Finally, sufficient time must be provided for the parties to prepare a case in response with either written or oral submissions or both.[148] This includes time to respond to any new information that may arise during a hearing including the need for an adjournment to allow adequate time to prepare a rebuttal.[149]

b) Disclosure of relevant and probative evidence

The decision maker is required to disclose all relevant evidence which they may rely upon. A failure to comply with this principle may be deemed to be a breach of natural justice.[150] This includes any information obtained from an outside body or expert whose knowledge or opinion may be relied on in the decision making.[151] However, in some circumstances a strict disclosure requirement may be mitigated by the availability of a fair hearing, especially if it is found that the plaintiff already had knowledge of the relevant information

[145] Failure to adjourn a hearing where inadequate details had been provided was deemed to be denial of a fair hearing in *Hillier v Lyttelton Borough Council*, unreported, High Court, Christchurch (Hardie Boys J), CP 149/86, 18 June 1987. See G D S Taylor, *Judicial Review* (1991) 278.

[146] *Murdoch v NZ Milk Board* [1982] 2 NZLR 108. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 860.

[147] *Air New Zealand v Mahon* [1983] NZLR 662 (PC). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 861 and G D S Taylor, *Judicial Review* (1991) 276–281.

[148] Whether written and/or oral submissions are allowed may depend on the type of hearing and what is fair in the circumstances. Formal oral submissions were found to be necessary in *Lambourne v Commercial & Private Agents Board* (1980) 23 SASR 475; *McVeigh v Willarra Pty Ltd* (1984) 6 FCR 587; *Perron v Central Land Council* (1984) 6 FCR 226. See, G D S Taylor, *Judicial Review* (1991) 276–81; See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 861.

[149] *Priddle v Fisher & Sons* [1968] 1 WLR 1478. Refusal to allow an adjournment to prepare a case may be a refusal of a fair hearing. See G D S Taylor, *Judicial Review* (1991) 278–279. See also, Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 860–861.

[150] *Rich v Christchurch Girls' High School Board of Governors (No 1)* [1974] 1 NZLR 1 (CA). See also Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 862. See Chapter 5.4.14 for comments on appeals from Employment Tribunal decisions.

[151] See *Mockford v NZ Milk Board*, unreported, HC Dunedin, 14/10/81, Roper J, where the Milk Board disclosed a report of Mockford's alleged transgressions which he had not seen or had the opportunity to respond to before the hearing. See also, *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) and *Byrne v Auckland Irish Society* [1979] 1 NZLR 351. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 861. The full report should be disclosed rather than a summary of its findings.

prior to the hearing.[152] Further, both parties must be given the opportunity to present evidence relevant to their case. Failure to allow such an opportunity may amount to a breach of natural justice.[153] However, refusal to allow irrelevant evidence would not constitute a breach.[154] The onus of observing principles of natural justice may be heavier where the other party is unrepresented or has no legal counsel.[155] The application of these rules will vary according to the nature and context of each case.[156]

The decision maker must make their decision based on relevant evidence which has been placed before them. There must be a factual foundation[157] for the decision but the weight given to the facts is a matter for the decision maker to determine.[158]

c) Warning of a potential adverse finding

A decision maker has a duty to warn a party if it is likely that the result of the hearing will be an adverse finding against them, particularly if it may result in negative findings about the reputation or credibility of the party or affect their property or livelihood.[159] Procedural fairness requires that the other party be able to take appropriate advice and have the ability to respond to the seriousness of the consequences.[160] If, during the hearing, it is obvious to the parties that credibility is in issue, the duty may not arise.[161]

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[152] *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32, 47–48. See also Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 861.
[153] See *R v Hull Prison Board of Visitors, ex p St Germain* (No 2) [1979] 1 WLR 1401 (DC) where 'the visitors refused to allow witnesses to be called because of the administrative inconvenience of bringing them in from other prisons.' See G D S Taylor, *Judicial Review* (1991) 279.
[154] *Byrne v Kinematograph Renters Society* [1958] 1 WLR 579 (ChD).
[155] *Terry v District Court at Greymouth* (1992) 10 FRNZ 135. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 862.
[156] For a description of the variables that may apply within the provision of adequate information, see Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 862–863.
[157] *R v Deputy Industrial Injuries Commissioner; Ex p Moore* [1965] 1 All ER 81, 94 (CA).
[158] Ibid. See also Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 869.
[159] *Re Erebus Royal Commission* [1993] 1 NZLR 662 (PC). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 863.
[160] Ibid.
[161] *Khalon v A-G* [1996] 1 NZLR 458, 466 (HC): 'If an adverse finding is foreseeable there is no surprise.' See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 863–864.

d) Representation

The rules of natural justice do not give a general right to representation in all situations.[162] An exception in the employment context is situations involving young vulnerable workers.[163] However, representation is seen as promoting access to justice, as representatives ideally possess skills in presenting their clients' cases, examining and cross-examining witnesses and presenting legal arguments in a persuasive manner.[164] However, it is possible to surmise that the use of representatives and adherence to a formal legal process increases legalism and formality and may lead to increased costs.[165] In general, tribunals and administrative bodies have the discretion as to whether or not to permit representation,[166] unless specifically excluded by statute.[167] Failure to exercise such discretion to allow representation or exercising it unfairly may be grounds for a judicial review or grounds of procedural unfairness in an employment context.[168] In determining whether or not to permit representation an authority should consider, among other things,

[162] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 864; GDS Taylor, *Judicial Review* (1991) 280–281.
[163] *Wellington Road Transport etc IUW v Fletcher Construction Co Ltd* [1983] ACJ 653 and *NZ IHC etc Staff Union v NZ Society for the Intellectually Handicapped (Inc)* [1990] 2 NZILR 1089.
[164] See below sub-para (e) for discussion of cross-examination. See Chapter 6.7 for adjudicator comments on the expertise of representatives.
[165] See para 7.4.1 below for discussion on legalism, formality, cost and delay and 7.4.2 for the impact on costs. See Chapter 5.8.3 for factors adjudicators took into account when awarding costs. See *Enderby Town Football Club Ltd v Football Assn Ltd* [1971] 1 All ER 215 (CA), Lord Denning MR. Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 865, describes Lord Denning in *Enderby* as 'questioning whether legal representation leads to excessive technicality, obfuscation of issues, expense and delay. He thought justice could often be done better by a good layperson than a bad lawyer, when either party could apply directly to the court for guidance on questions of law or construction.'
[166] *Maynard v Osmond* [1977] 1 QB 240, 252 (CA); *R v Maze Prison Board of Visitors, ex p Hone* [1988] AC 379 (HL). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 865. See also, G D S Taylor, *Judicial Review* (1991) 281 and G D S Taylor, *Judicial Review: A New Zealand Perspective* (Supplement to the First Edition, 1997) 94.
[167] See, for example, *Maynard v Osmond* [1977] 1 QB 240 (CA) and *Midwood v Paremoremo Medium Security Prison Superintendent* [1991] 1 NZLR 442 (CA) where regulations excluded the right to representation where a rapid decision was required. To exclude the discretion to allow representation Parliament would have to make its intention clear. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 865.
[168] *R v Secretary of State for the Home Department; Ex p Tarrant* [1985] 1 QB 251. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 865. See also *Wellington Road Transport etc IUW v Fletcher Construction Co Ltd* [1983] ACJ 653.

the seriousness of the issue,[169] potential consequences, and the ability of parties to present their own case.[170] The courts have said that in circumstances where a person's livelihood or reputation may be affected, there should be a general right to representation.[171]

e) Cross-examination

There is a general right to cross-examine witnesses in the ordinary courts.[172] For administrative bodies, the general principle relating to the conduct of oral hearings with witnesses is that a right of cross-examination is implied.[173] In the case of any tribunal which sets its own procedure it is likely that a refusal to permit cross-examination would be seen to breach natural justice[174] and a subsequent decision may be invalidated.[175] Administrative authorities are not generally subject to the same rules of evidence that apply to the courts.[176] If cross-examination is not permitted the opposing party is unable to test the validity of, for example, hearsay evidence.[177] In particular, natural justice will generally require cross-examination to be allowed where livelihood is at stake or

[169] *R v Secretary of State for the Home Department; Ex p Tarrant* [1985] 1 QB 251. See G D S Taylor, *Judicial Review* (1991) 281.
[170] See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 865, for a discussion of other relevant considerations.
[171] *Pett v Greyhound Racing Assn Ltd* [1968] 2 All ER 545, 549 (CA) Lord Denning MR. See also, *Maynard v Osmond* [1977] 1 QB 240 (CA). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 865 and G D S Taylor, *Judicial Review* (1991) 281.
[172] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 866.
[173] See *Re Attorney General of Manitoba and National Energy Board* (1974) 48 DLR (3d) 73 (FedTD). See also, *Trustees of Rotoaria Forest Trust v Attorney-General* [1999] 2 NZLR 452, 463. The *audi alteram partem* rule will generally require 'that parties to litigation are entitled to test evidence called against them by cross-examination.' See Kenneth Johnston, 'King John, Runnymede, the Magna Carta, and Other Stuff' [2000] ELB 158, 158. See also, G D S Taylor, *Judicial Review* (1991) 280.
[174] *Rangitikei Wanganui Catchment Board v National Water & Soil Conservation Authority*, (Unreported, High Court (Administrative Division) Wellington, Grieg J, CP 207/88 and AP 41/88, 29 September 1989). See, G D S Taylor, *Judicial Review* (1991) 280, para 13.36. Tribunals which set their own procedures may not be 'constrained by the formal *audi alteram partem* rules so long as general principles of fairness are accorded. This will not always include a right to cross-examination.'
[175] See, for example, *Wednesday Corporation v Ministry of Housing and Local Government (No 2)* [1966] 2 QB 275 (CA). See G D S Taylor, *Judicial Review* (1991) 280.
[176] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1993] 1 *New Zealand Law Review* 662 (PC). See Philip A Joseph, Constitutional and Administrative Law in New Zealand (2nd ed, 2001) 867.
[177] *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 1 WLR 1401 (DC); [1979] 3 All ER 545 (QB). See Philip A Joseph, Constitutional and Administrative Law in New Zealand (2nd ed, 2001) 867.

credibility and reputation could be at issue.[178] An investigative authority cannot be cross-examined on its inquiries before making its decision.[179]

f) Reasons

Natural justice requires that reasons be given for any decisions made.[180] The omission or refusal to give reasons for a decision runs the risk of giving the impression that the decision had no sound foundation and may have been arbitrary.[181] Providing reasons ensures that parties can see that their issues have been listened to and considered and that a decision has been reached by applying the law to the facts.[182] Further, if parties are dissatisfied with how the decision has been made, the reasons will provide the basis for any appeal and ensure an appellate body can identify the basis on which the original decision was made. [183]

3.3.2(B) A FAIR AND NEUTRAL DETERMINATION – THE RULE AGAINST BIAS

The rules of natural justice require that a decision maker must act fairly and without bias. This provision ensures that justice will not only be done but also be seen to be done, to

[178] *R v Milton Keynes Justices; Ex p R* [1979] 1 WLR 1062. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 866.
[179] *Justice v South Australian Trotting Control Board* (1989) 50 SASR 613. See, G D S Taylor, *Judicial Review* (1991) 280. See Chapter 8.3 for discussion of the investigative function of the Employment Relations Authority and the right to cross-examination in the Employment Relations Authority.
[180] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 871; 'Unsupported decisions spawn suspicion of caprice and arbitrariness and are anathema to the principle of open justice and the rule of law.'
[181] See, for example, *NZ Fishing Industry Assn Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); *Glaxo NZ Ltd v A-G* (1990) 4 TCLR 170. Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 872.
[182] In *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565–567 (CA) the Court of Appeal gave three reasons why judges should provide reasons for their decisions. Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 871–872.
[183] In *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 566 (CA) the Court of Appeal said that a failure to give reasons for the decision made would not defeat any potential review or appeal rights. Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 872.

maintain public confidence in administrative processes and the justice system.[184] The rule requires the decision maker to be impartial when making decisions about parties or their issues. If the decision maker has a conflict of interest or bias towards a particular result or party, this must be declared and the decision maker will be disqualified from hearing the case unless both parties give their consent to proceed regardless.[185]

Where the decision maker has a direct financial interest in the decision being made they will automatically be disqualified from hearing the case.[186] This is termed presumptive bias. Apparent bias occurs when the decision maker has 'a personal or professional relationship to a party or witness, or a prejudice against or preference towards a particular result, or a predisposition leading to a predetermination of the issue(s).'[187] The test to determine apparent bias was established in the *Auckland Casino* case, where it was held that it was necessary to ask if a real danger or real possibility of bias existed.[188]

The rule against bias will apply differently depending on the circumstances. For example the rule will be applied more stringently to a member of the judiciary than to a member of an administrative panel.[189] Further, the courts have acknowledged that some decision

[184] *R v Sussex Justices; Ex p McCarthy* [1924] 1 KB 256, 256, Lord Hewart – '[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.' The leading case on bias in New Zealand is the Court of Appeal judgment in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 *New Zealand Law Review* 142. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 874 and following. See, G D S Taylor, *Judicial Review* (1991) 287 and G D S Taylor, *Judicial Review: A New Zealand Perspective* (1997) 95.

[185] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 874.

[186] *Anderton v Auckland City Council* [1978] 1 NZLR 657, 680. A pecuniary interest raises 'an irrebuttable presumption of disqualification.' See also, *NZI Financial Corp Ltd v NZ Kiwifruit Authority* [1986] 1 NZLR 159, 164. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 876.

[187] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 875.

[188] *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA). The Court of Appeal followed the House of Lords decision in *R v Gough* [1993] AC 646 (HL). See, Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 879.

[189] *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 277 where the commissioner was not expected to have the same 'detached impartiality' as a judge. See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 880.

makers will inevitably have preconceived ideas and policy principles which form part of their decision making process on policy and its application.[190] The tests to determine apparent bias are based on what the reasonable observer would see as bias in the circumstances.[191]

3.3.3 NATURAL JUSTICE IN EMPLOYMENT LAW

The application of the principles of natural justice in employment law will vary considerably depending on the context of the enquiry. Natural justice operates in employment law on two levels. Initially, at the workplace level it imposes a duty on the employer to act in a procedurally fair manner when dealing with employment related matters, in particular in disciplinary investigations and dismissals.[192] This is particularly relevant to this thesis, as a lack of procedural fairness is often the reason for a personal grievance having arisen in the first place.[193]

At the second level or more formal stage of proceedings, natural justice entitles both parties to a fair and independent hearing from an unbiased Tribunal or Employment Court. Further, either the Employment Court or Court of Appeal had the ability to review the decisions and processes of the lower body to ensure that all parties had been treated fairly and had the opportunity to be heard and respond appropriately to the matters at issue.[194]

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[190] In *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 194 (CA) Richardson J said that, 'The application of the rules against bias must be tempered with realism.' See, Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 884.
[191] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 875.
[192] Ibid 858. See also, Anne Boyd, *Procedural Fairness in Performance Dismissals*, NZ Council of Trade Unions, Occasional Papers on Employment Law, August 1997, 6.
[193] See Chapter 2.3.3.
[194] See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 858.

Historically in employment law, a valid dismissal under common law only required 'reasonable notice and wages in lieu.'[195] However, union members obtained additional statutory protection from unjustified dismissal from 1973 under the *Industrial Relations Act 1973*.[196] As case law developed, the rules of natural justice were implied to be deemed part of all employment contracts after the 1985 Court of Appeal decision in *Auckland Shop Employees IUW v Woolworths*[197] and full coverage of all employees regardless of union membership was extended by statute under the *Employment Contracts Act 1991* and the *Employment Relations Act 2000*.

Despite attempts during the 1990s to dispense with an emphasis on procedural fairness it is clear that the courts will continue to adhere to these principles. Although the *Employment Contracts Act 1991* introduced changes to the employment institutions and some changes to the procedure for resolving personal grievances, there was no statutory alteration to the interpretation of the principles relating to procedural fairness established by the courts under previous legislation.[198] As noted by the Labour Select Committee:[199]

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[195] Ibid. See also *Addis v Gramophone Co Ltd* [1909] AC 488.

[196] See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 858. Those employees who were not union members or were above the salary bar in their award were not covered and had to seek remedies at common law. Natural justice applies to suspensions as well as dismissals, even if the suspension is made to allow the employer to carry out an investigation. *Association of Staff in Tertiary Education v Northland Polytechnic Council* [1992] 2 ERNZ 943. Suspension as a disciplinary measure was seen as a 'drastic measure' with 'devastating effect' by Richardson J in *Birss v Secretary for Justice* [1984] 1 NZLR 513, 521, a judicial review case. Hughes et al, *Personal Grievances* (2005) para 4.9.

[197] *Auckland Shop Employees IUW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA). See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 858. The Court of Appeal 'established that it was an implied term of the employment contract that any inquiry into alleged employee dishonesty or incompetence must be conducted in a fair and reasonable manner.' See also, G D S Taylor, *Judicial Review* (1991) 270, para 13.21. 'Courts in New Zealand… have not hesitated to apply the same principles… to offices and contracts of employment alike.'

[198] Although Parliament had considerable discussion on the Employment Contracts Bill there was no debate in Hansard on the interpretation of 'unjustified dismissal' and 'unjustified action' established by cases such as *Auckland City Council v Hennessey* [1982] ACJ 699 (CA); *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35 and *Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd* [1982] ACJ 663. Jack Hodder, Joanna Holden, Sarah Coleman, *Review of the Institutions and the Employment Contracts Act 1991 – The Meaning of 'Unjustified Dismissal'* (November, 1997).

> [t]he requirements of procedural fairness in dismissal cases… are simply a translation of the principles of natural justice into the employment setting. The explicit overruling of these requirements [would remove] what are regarded, in New Zealand and internationally, as basic employment rights.

3.3.3(A) NATURAL JUSTICE IN AN EMPLOYER'S ENQUIRY

In most situations, any decisions that an employer intends to make which will negatively affect an employee's employment must be conducted in a procedurally fair manner. The minimum requirements of procedural fairness in the context of alleged misconduct were set out in *NZ Food Processing Union v Unilever NZ Ltd*[200] as: notice to the employee of the specific allegations complained of and the likely consequences if proved correct;[201] a real opportunity for the employee to answer and/or mitigate the allegations;[202] and unbiased consideration of the employee's explanation, that is not pre-determined and is free from irrelevancies.[203] The procedural fairness requirements will generally be most stringently applied in cases of misconduct because of the potentially serious consequences, however, in other cases such as redundancy,[204] poor performance,[205] sickness[206] and

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[199] Department of Labour, Report to the Labour Select Committee, 1991. See John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 138.

[200] *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35.

[201] *Mazengarb's Employment Law* (1999), para 27.53. The allegations must be those relied on in the dismissal.

[202] Real as opposed to nominal opportunity. See, *Quinn v Bank of New Zealand* [1991] 1 ERNZ 1060, 1070. *Mazengarb's Employment Law* (1999), para 27.54 This reflects International Labour Organisation Convention 158, Article 7 – 'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.' See also, *Mazengarb's Employment Law* (1999) para 27.54.

[203] *Wellington Hotel Union v Harrap* [1981] ACJ 261. See also *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, 46. Hughes et al, (eds) *Personal Grievances* (2005). But see Louise Freyer, 'Unjustifiable Dismissal: Procedural Fairness and the Employer' (1997) 22(2) NZJIR 143, 145. A considerable body of case law grew surrounding these requirements which some argued made it difficult and unfair to employers who were required to adhere to them. For discussion of this argument see Chapter 8.1.1(a).

[204] The leading case on procedural fairness in redundancies is *Wellington etc Caretakers etc IUW v G N Hale and Son Ltd* [1990] 1 NZILR 752. For further information on redundancy see *Mazengarb's Employment Law* (1999) para III.28 and para 27.88. For procedural fairness in redundancy dismissals see para 27.45.

[205] *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 set out a number of questions to determine whether a dismissal for poor performance was fair. In *Pacific Forum Line Ltd v NZ Merchant Service Guild*

abandonment of employment,[207] the requirements of procedural fairness may vary. While the more adversarial procedure required in misconduct cases may be unsuitable in these cases, procedural fairness would still require an unbiased approach to the facts, an open mind when making a decision, and a flexible approach to possible consequences.[208] Factors such as the size of the employer's business and resources available are also of some relevance to the requirement of strictly adhering to procedural fairness.[209]

The courts have made it clear that an employer's obligation to adhere to the principles of natural justice would not necessarily be as strictly enforced in an employer's enquiry as they would have been in the Tribunal or a Court hearing. The overarching approach was to ensure that the employer conducted a full and proper investigation and that it was fair.[210] This did not mean that in some circumstances an employer could not dismiss an employee 'on the spot', however, they would have run the risk that if they had conducted a proper inquiry they would have found that instant dismissal may not have been the most

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IUOW [1991] 3 ERNZ 1035, 1046, Judge Colgan said 'It is only fair that where an employee is so criticised for poor performance that termination of the employment is contemplated, clear advice to this effect should be given and an opportunity to improve or to disagree with the assessment given, if this is to be the justification for dismissal.'

[206] If an employee is unable to work because of sickness or incapacity the employer is not bound to hold their job open for an indefinite period. See, *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd* [1983] ACJ 875, 877, cited with approval by Judge Travis in *McDowell v New Zealand Breweries Ltd* [1992] 2 ERNZ 597, 611. However, the employer must still act in a procedurally fair manner if the employment is terminated. See, *Auckland and Tomoana Freezing Works IUW v Wilson Foods Ltd* [1990] 3 NZILR 939. See generally, Hughes et al, (eds) *Personal Grievances* (2005) para 4.27, Sickness and Incapacity; Neville Taylor, 'Dismissals for Illness and Injury,' [1995] ELB, 77.

[207] Where an employee abandons their employment the extent to which the principles of natural justice may apply may depend on what has been included in the relevant Employment Agreement. See, for example, *Pitolua v Auckland City Council Municipal Abattoir* [1990] 2 NZILR 589; [1992] 1 NZLR 6; [1992] 1 ERNZ 693 (CA). See, Hughes et al, (eds) *Personal Grievances* (2005) para 4.10.

[208] Hughes et al, (eds) *Personal Grievances* (2005) para 4.3.

[209] Ibid.

[210] *Airline Stewards and Hostesses (NZ) IUW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA). Hughes et al, *Personal Grievances* (2005) para 4.8.

appropriate remedy. In a leading New Zealand Court of Appeal authority Justice Bisson has suggested that:[211]

> In some situations the facts are so clear that instant dismissal is justified. In other situations an explanation by the employee may not be fully satisfactory but sufficient to require further consideration and possibly some investigation… An employer could not justify the dismissal of any employee if he had closed his eyes to available evidence or not given the employee an opportunity to be heard in his or her own defence.

However, without a proper investigation it is difficult for an employer to show that it had a reasonably held belief that sufficiently serious misconduct had occurred which justified the employee's dismissal or as Bisson J indicates:[212]

> What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have had either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing as he did believe that the employee was at fault.

The requirement to hold an investigation did not mean the employer had to meet the same standard as a court, but the inquiry must have been independent[213] and according to Justice Bisson have taken into account relevant evidence available at the time of the dismissal:[214]

> Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable inquiries if the employee has not had sufficient opportunity to answer the employer's complaint.

An employer's process was not required to be perfect in every detail[215] but must have been seen to be fair in the circumstances of the case.[216] Cooke J has said:[217]

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[211] *Airline Stewards and Hostesses (NZ) IUW v Air New Zealand Ltd* [1990] 3 NZLR 549, 553–554 (CA) Bisson J.
[212] Ibid 556 (CA) Bisson J. Also Hughes et al, *Personal Grievances* (2005) para 4.8.
[213] See *Hati v Auckland Farmers Freezing Co-op Ltd and Auckland and Tomoana Freezing Works IUW* [1988] NZILR 662, where it was held that relying on a detective's belief that theft had occurred meant that the decision to dismiss was not substantively justified. See also, *Davis v Golden Bay Cement Company Ltd* [1993] 2 ERNZ 742 and *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31.
[214] *Airline Stewards and Hostesses of New Zealand IUW v Air New Zealand Ltd* [1990] 3 NZLR 549, 556 (CA).

> …we think that the position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary notion.

The individual principles of natural justice applied to an employer's enquiry depending on the nature of the allegations made and, should they be proved accurate, the possible outcome for the employee. Prior notice of a disciplinary meeting was not always required if the employee was already aware of the complaints made.[218] However, where the employee was not aware of the complaints or where the allegations or possible outcomes were serious, prior notice of the meeting and its possible outcome would generally be required.[219] Such notice had to contain sufficient detail of the allegations made and the evidence the employer intended to rely on to provide the employee with a real opportunity to respond.[220]

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[215] Ibid 553, Bisson J – 'Put briefly, an employer in the conduct and management of its business is not called upon to sit in judgment of an employee and require proof beyond reasonable doubt of alleged misconduct… [but is] required to act fairly in considering the interests of the employer's business and of the employee's employment in that business.'

[216] *New Zealand Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, 46. 'Failure to observe any one of [the minimum] requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.' Quoted with approval in *Finsec v AMP Society* [1992] 1 ERNZ 280 and *Sparkes v Parkway College Board of Trustees* [1991] 2 ERNZ 851. See also, *Purchase v John Sands NZ Ltd*, unreported, Auckland Employment Court, AEC 57/96; *Mazengarb's Employment Law* (1999) para 27.51. But see Louise Freyer, 'Unjustifiable Dismissal: Procedural Fairness and the Employer' (1997) 22(2) NZJIR 143, 147, who argued that the Employment Court 'does at times subject the employer's conduct to "pedantic scrutiny".'

[217] *Goulden v Marlborough Harbour Board* [1985] 2 NZLR 378, 383, Cooke J (obiter).

[218] *Northern (except Gisborne) Butchers IUW v Peach and Vienna Foods Ltd* [1982] ACJ 379. Hughes et al, *Personal Grievances* (2005) para 4.11.

[219] *COMPASS Union of New Zealand Inc v Foodstuffs (Auckland) Ltd* [1992] 3 ERNZ 16. Hughes et al, *Personal Grievances* (2005) para 4.11.

[220] *Northern Industrial District etc Storepersons etc IUW v Nathan Distribution Centres Ltd* [1986] ACJ 774. Hughes et al, *Personal Grievances* (2005) para 4.11.

Under s 59 of the *Employment Contracts Act 1991* employees were entitled to be represented by the person of their choice in the Tribunal or Court.[221] This section did not expressly dictate an entitlement to employee representation at disciplinary meetings. However, accepted practice, and the courts' recommendations, meant that union representation, at least, was advisable in those circumstances.[222] Procedural unfairness was more likely to be found where a young or inexperienced worker was unrepresented,[223] or where a request for representation was denied.[224] The *Employment Tribunal Regulations 1991* provided the right to cross-examination in the Tribunal but in the employer's enquiry this may not always have been appropriate or practicable.[225] However, it is submitted that an employee who faced serious allegations should have been entitled to test the strength of the allegations made and the credibility of the parties making them. A failure to allow this would arguably have been a breach of natural justice by the employer.

The courts have held that an employer who has dismissed an employee must give the employee reasons for the dismissal at the time of the actual dismissal.[226] Failure to provide

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[221] *Employment Contracts Act*, s 59, Representation – (1) Where any Act to which this section applies confers on any employee the right to do anything or take action –

(a) In respect of an employer; or

(b) In the Tribunal or the Court, –

that employee may choose any other person to represent the employee for the purpose.

[222] *NZ Printing Trades etc IUW v Printing & Packaging Corp Ltd* [1987] NZILR 907, '… the advisability of having such a person present in such circumstances has been accepted by most unions and employers as wise practice.' See Hughes et al, *Personal Grievances* (2005) para 4.13. Since the *Employment Contracts Act 1991* the Court has greatly tightened up on the representation issue and a lack of representation at a discipline meeting is more likely to be seen as a breach of natural justice.

[223] See, for example, *Wellington Road Transport etc IUW v Fletcher Construction Co Ltd* [1983] ACJ 653. This would also apply to an employee with language or cultural barriers. See *NZ Baking etc Union v Stormonts Bakeries Co Ltd* unreported, AEC 18/94 Judge Colgan. Hughes et al, *Personal Grievances* (2005) para 4.13.

[224] See for example, *Henare v Game Foods (NZ) Ltd* [1991] 3 ERNZ 277 (ET) where the employee was refused a representative because he was himself a union delegate. Hughes et al, *Personal Grievances* (2005) para 4.13.

[225] *Employment Tribunal Regulations 1991*, reg 49(f) – 'The parties may examine, cross-examine, and re-examine witnesses.'

[226] *Scown v Marubeni Auto Sales (NZ) Ltd (t/a Newmarket Nissan MVDI)* [1991] 3 ERNZ 655, 666 (ET). This should be distinguished from the right to request reasons for dismissal under *Employment Contracts Act 1991*, s 38, once the personal grievance has been lodged.

reasons may have been found procedurally unfair.[227] If reasons were not given the employee could not be certain of the grounds the employer took into account and whether irrelevant factors may have been counted without the employee being given the opportunity to respond.[228]

The rule against bias required the employer to listen to the employee's explanation with an open mind and make enquiries in an independent way where possible.[229] When making a decision the employer must have acted in an unbiased way and not have pre-determined the outcome of any investigation.[230] Predetermination of an outcome is a form of apparent bias.[231] The courts have recognised, however, that in most cases it would be impossible for an employer not to have formed some opinion about one of their employees before any enquiry.[232] Expectations of open-mindedness were therefore not as stringent in an employee enquiry as would, for example, be required in a court setting.[233]

[227] *Northern Distribution IUW v Newmans Coach Lines Ltd* [1989] 2 NZILR 677; *Nelson Polytechnic v NZ Assn of Polytechnic Teachers* [1989] 2 NZILR 796. See Hughes et al, *Personal Grievances* (2005) para 4.16.
[228] *Northern Distribution IUW v Newmans Coach Lines Ltd* [1989] 2 NZILR 677.
[229] See *Northern (except Gisborne) Butchers IUW v Peach and Vienna Foods Ltd* [1982] ACJ 379, 386 which required 'proper consideration' of an employee's explanation. Proper consideration required an open mind. See also, *Airline Stewards and Hostesses (NZ) IUW v Air New Zealand Ltd* [1990] 3 NZLR 549; *Van der Molen v CCS (Dunedin) Inc* [1991] 3 ERNZ 900 (ET). See Hughes et al, *Personal Grievances* (2005) para 4.15.
[230] To pre-judge the outcome would be contrary to natural justice. See, for example, *NZ IHC etc Staff Union v NZ Society for the Intellectually Handicapped (Inc)* [1990] 2 NZILR 1089.
[231] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 885.
[232] *Peters v Collinge* [1993] 2 NZLR 554, 566, Fisher J (obiter) said that '[n]o one would expect an employer contemplating a dismissal to approach his or her task with a mind untainted by preconceptions.' This is a translation of the principle outlined in the judicial review context above para 3.3.2(b). See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).
[233] See, for example, *NZ Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883, 891, where Travis J held that an employer was not required to hold an enquiry with an 'independent and impartial decision-maker… To hold otherwise would effectively prevent employers themselves deciding whether there are grounds for dismissal.' See Hughes et al, *Personal Grievances* (2005) para 4.15. See above, para 3.3., for the application of this principle in the ordinary courts.

Employees were generally to be treated consistently in circumstances where situations giving rise to disciplinary actions were similar.[234] On the face of it, disparity of treatment appears to provide evidence of bias; however, in some circumstances an employer may have had good reason for treating employees differently. For example, an untrained employee who may have been unaware that their actions amounted to misconduct may be treated differently from a senior employee who ought to have known the consequences of their actions.[235]

The emphasis on procedural fairness and its relationship with substantive justification has been the subject of much debate. Employer groups took the view that too much emphasis was placed on procedural fairness and the lack of consideration pertaining to contributory fault by the employee did not adequately redress the perceived imbalance against the employer created by a strict procedural fairness requirement.[236] However, it has been well established in case law that procedural fairness is fundamental to the structure and well-being of an employment relationship based on mutual trust and confidence.[237] Despite arguments to the contrary by employers the Courts have often reiterated that procedural fairness is a right which must be adhered to. Goddard CJ has summarised the issue as:[238]

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[234] For an overview of the development of this premise see Meelan Douggal, 'Procedural Disparity in Dismissals for Misconduct' [2006] ELB 63.

[235] Ibid.

[236] *Employment Contracts Act 1991*, s 40(2), 'Where the Tribunal or the Court determines that an employee has a personal grievance by reason of being unjustifiably dismissed, the Tribunal or Court shall, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and shall, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.' See Louise Freyer, 'Unjustifiable Dismissal: Procedural Fairness and the Employer' (1997) 22 NZJIR 143.

[237] *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, 45. 'Procedural fairness and the rules of natural justice embrace similar if not identical concepts of fair and reasonable dealing. Those concepts are fundamental requirements and characteristics of the employment relationship.' This concept is reinforced by Court of Appeal judgments in *Auckland City Council v Hennessey* [1982] ACJ 699, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 and *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378.

[238] *Ruffell v Women's Refuge* [2002] 1 ERNZ 409, 428, para 63, Goddard CJ.

> It is well recognised that a personal grievance of unjustified dismissal or other action can be established where there has been a failure of procedure. As this Court has held many times, it is wrong to say that such a failure is merely procedural for procedure is power and, in some cases, a deprivation of procedural rights is effectively deprivation of all rights. It is well to bear in mind that in a free and democratic society some of the most important rights that we possess are procedural in nature. Thus it is not at all surprising to see that the *New Zealand Bill of Rights Act 1990* recognises and affirms electoral rights, and the right to minimum standards of criminal procedure and to justice, all of which are procedural in character. The minimum procedural requirements as laid down in the cases are not as rigorous as what is required of the State in conducting criminal prosecutions because it is recognised that an employer is entitled also to have regard to the employer's interest when conducting disciplinary processes. However, in doing so, the employer is required to observe elementary standards of fair process…

While procedural fairness and substantive fairness may be distinguished for the purposes of distinct analysis, the courts have held that 'there is no sharp dichotomy' between the two.[239]

3.3.3(B) NATURAL JUSTICE IN THE EMPLOYMENT TRIBUNAL AND EMPLOYMENT COURT

Under the *Employment Contracts Act 1991* the Employment Tribunal and the Employment Court exercised their jurisdiction 'as in equity and good conscience' as they saw fit.[240] Further, one of the objects of the Act was to facilitate 'mutual resolution' of differences by providing 'speedy, fair and just resolution of differences between parties to employment contracts.'[241] Section 88 of the Act required the Employment Tribunal to 'act fairly'.[242] The emphasis on legislative fairness and the case law developed under the *Employment*

[239] *Nelson Air Ltd v New Zealand Airline Pilots Association* [1994] 2 ERNZ 665, 668 (CA).
[240] *Employment Contracts Act 1991*, s 79(2) and s 104(3) 'In all matters before it… the Tribunal [Court] shall have full and exclusive jurisdiction to determine them in such matter and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective employment contract, as in equity an good conscience it thinks fit.'
[241] *Employment Contracts Act 1991*, s 76(b) and (c). See generally Chapter 2 for legal framework; Chapter 5 for results of personal grievances; Chapter 6 for adjudicators' views and Chapter 7 for the opinions of representatives and parties in terms of these objectives.
[242] *Employment Contracts Act 1991*, s 88(3) 'In any adjudication proceedings, the Tribunal shall act fairly.'

Contracts Act 1991 showed that the principles of natural justice equally applied in the Employment Tribunal and Employment Court.[243]

The equity and good conscience provision, in particular, appeared to give the Employment Tribunal and Employment Court more flexibility in decision making than the other civil courts. They were able to interpret legislation in a manner that they considered fair in the circumstances, provided the interpretation was not specifically inconsistent with either the *Employment Contracts Act 1991*, any other Act or any applicable employment contract. In the *Talley Fisheries* case Goddard CJ said that 'highly technical grounds' had developed under the *Labour Relations Act 1987* and that:[244]

> Now that these chains have been broken, it is quite plain that, wherever possible, technicalities must be put to one side and both the Court and the Tribunal exercising their respective jurisdictions must recognise that the duty which they are required to discharge is a duty to do substantial justice to the parties according to the real equities and merits of the cases before them.

He went on to say that 'equity and good conscience imports a broader view of justice and fairness than is comprehended by the mere enforcement of rights.'[245] An equity and good conscience jurisdiction was considered 'unique to the employment relationship'.[246] This was interpreted by the courts to mean that the employment jurisdiction was not subject to the same constraints and technicalities as the ordinary courts.[247]

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[243] This was underpinned by International Labour Organisation Convention 158, Article 8(1) – 'A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.'

[244] *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756, 769. See, Hodder et al, *Review of the Institutions and the Employment Contracts Act 1991 – The Meaning of "Unjustified Dismissal"* (November 1997) 5; Walter Grills, 'Dispute Resolution in the Employment Tribunal, Part Two: Adjudication' (1993) 18(1) *Journal of Industrial Relations* 84, 92–3.

[245] *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756, 769.

[246] Hodder et al, *Review of the Institutions and the Employment Contracts Act 1991 – The Meaning of "Unjustified Dismissal"* (November 1997) 5.

[247] *Wellington Road Transport Union of Workers v Fletcher Construction Company Limited* (1983) ERNZ Sel Cas 11, 14. This case was decided under the *Labour Relations Act 1987* which contained the same equity and good conscience provision. See Hodder et al, *Review of the Institutions and the Employment Contracts Act 1991 – The Meaning of "Unjustified Dismissal"* (November 1997) 6.

> [R]ecourse to technical language or the analogy of rules developed in conventional Courts will not always be particularly helpful.

Despite the intention in these provisions that the Employment Tribunal would operate in a manner that was 'more concerned with the fairness of the case, than a pedantic adherence to legal arguments and rules',[248] the findings of this research and of that conducted by other commentators was not wholly consistent with that intention.[249] Many of these commentators have said that one reason for this disparity was the complex legal process which developed and the increased use of legal representation, which resulted in time delays and increased costs.[250] Further, while mediation assistance was encouraged, it was not compulsory, which meant that an opportunity to resolve personal grievances at a low-level, low cost stage in proceedings might be lost.[251] However mediation also had the potential to create further litigation over the later admissibility of evidence presented at mediation.[252]

The above issues illustrated the tension between the Objects of the *Employment Contracts Act 1991* and the reality of applying the legislation and the regulations to the personal grievance process. The Objects sections of any legislation are designed to 'set the scene' and give the philosophical context of an act. Provisions in an act and any regulations made

[248] Hodder et al, *Review of the Institutions and the Employment Contracts Act 1991 – The Meaning of "Unjustified Dismissal"* (November 1997) 6.
[249] See Chapters 5, 6 and 7. See also, for example, Ian McAndrew, 'The New Zealand Employment Tribunal: A Review and Assessment' (1995) 33(2) *Asia Pacific Journal of Human Resources* 36; W R C Gardiner, *The Employment Tribunal (A Report from the Trenches)*, 13 May 1998; B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] *New Zealand Law Review* 282; Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55; Labour Select Committee Report, *Report of the Labour Committee on the Inquiry into the Effects of the Employment Contracts Act 1991 on the New Zealand Labour Market'*, 21 September 1993.
[250] See Chapter 8.1 for full discussion of these topics. See also, Chapters 5.4.8, 6.4.10, and 7.5.8 for findings on the effects of delay.
[251] *Employment Contracts Act 1991*, s 80, Mediation assistance.
[252] See, for example, *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672; and *Turner v Wech* (unreported, Employment Court, Auckland, Palmer J (AC93/98) 3 December 1998), although it should be noted that this latter case concerned a private mediation.

under it should be read in light of the Objects provisions. However, in the case of the *Employment Contracts Act 1991*, the operational sections of the Act were not always consistent with the principles set out in its Objects sections. They tended to be prescriptive and constrained the process used by the Employment Tribunal or Court when determining personal grievances. For example, the right to cross-examination[253] and the right to representation[254] were prescribed by legislation. This created a tension with the Tribunal's right, under s 88 *Employment Contracts Act 1991*, to set its own process, as s 88 was subject to other sections of the Act and any regulations made under it.[255] The flexibility to alter procedure could be seen as part of natural justice, as it allowed the Employment Tribunal to adjust their process to accommodate such things as cultural differences or to assist self-represented parties.[256] However, this freedom was clearly limited. Hughes[257] suggests that 'formality and legalism [were] inevitable aspects of a Tribunal which [sat] under formal rules to hear adversarial cases brought by legally represented parties.' The 90-day rule and procedural steps for lodging claims created technical obstacles for

[253] *Employment Tribunal Regulations 1991*, reg 49(f) – 'The parties may examine, cross-examine, and re-examine witnesses.'

[254] *Employment Contracts Act 1991*, **s 59 Representation** – (1) Where any Act to which this section applies confers on any employee the right to do anything or take action –

(a) In respect of an employer; or
(b) In the Tribunal or the Court, –

that employee may choose any other person to represent the employee for the purpose.

Section 90 Appearance of parties – (1) Any party to any proceedings before the Tribunal may –

(a) Appear personally; or
(b) Be represented by a representative chosen under section 59 of this Act whom the Tribunal is satisfied has authority to act in the proceedings; or
(c) Be represented by a barrister or solicitor –

And may produce before the Tribunal such witnesses, documents, books, and other evidence as the party thinks proper.

[255] *Employment Contracts Act 1991*, s 88(1) 'The procedure of the Tribunal shall, subject to this Act and to any regulations made under it, be such as the Tribunal thinks fit.'

[256] See Harris BV, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] *New Zealand Law Review* 282. See also Chapter 6, para 6.4.8 for adjudicators' comments on varying the procedure. The most frequently cited reason for varying the procedure was for self-representatives. See Chapter 6.4.7 for adjudicators' comments on self-representatives.

[257] John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 139.

claimants. The restriction on appeals to the Employment Court also meant that the Employment Tribunal heard more legal argument, increasing the level of formality.[258]

Similarly, the equity and good conscience jurisdiction was restrained by the same requirement to exercise the discretion in a manner consistent with the *Employment Contracts Act 1991*, any other Act, or the relevant collective employment contract.[259] As a result, the equity and good conscience jurisdiction was most often applied only in the award of appropriate remedies[260] and its potential to facilitate greater access to justice was arguably unfulfilled.

As was the case in the general courts and in an employer's enquiry, the principles of natural justice required that the Employment Tribunal and Court gave written reasons for their decisions. Judge Travis held in *Smith v Armourguard Security*[261] that there was no general obligation to provide full reasons but the failure to do so might have jeopardised any appeal. This was supported by the statutory obligation to be fair and 'may make it virtually essential to give reasons so that the decision cannot be regarded as arbitrary.'[262]

[258] Ibid. See also, Paul Roth, 'The Cost of "Individualising" Labour Law', [1997] ELB 82. See Chapter 8.2.3 for more discussion on these issues.
[259] In *The Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537, 546, the Court of Appeal said that it would be inconsistent with the *Employment Contracts Act 1991* to use the equity and good conscience provisions to override the terms of the underlying collective employment contract. Likewise the Court said that the equity and good conscience provision was subject to the State Sector Act. Hodder et al, *Review of the Institutions and the Employment Contracts Act 1991 – The Meaning of "Unjustified Dismissal"* (November 1997) 6.
[260] See *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd* [1987] NZILR 959, 963 Cooke P; 'Without attempting any exhaustive statement of the occasions when [the equity and good conscience jurisdiction] can appropriately be used, one can say that they include cases where an award does not in its words or spirit clearly cover a particular set of facts; cases where there are some deficiencies or lack of precision in the evidence; cases where appropriate remedies, as for unjustified dismissal, have to be determined.'
[261] [1993] 1 ERNZ 446. In this case Judge Travis outlined the basis for the requirement to give reasons for a decision or finding of credibility.
[262] *Smith v Armourguard Security Ltd* [1993] 1 ERNZ 446, 455, Travis J. See Hughes, *Personal Grievances* (1999) para 2.27.

Regulation 48 of the *Employment Tribunal Regulations 1991* required the Employment Tribunal to give written reasons for its final decisions in all adjudication hearings.

As well as appeal, parties dissatisfied with an Employment Tribunal or Employment Court decision were able to seek judicial review in the Employment Court or Court of Appeal.[263]

3.4 SUMMARY

This chapter has outlined the principles of access to justice and defined its component parts. Issues have also been discussed in relation to the potential links between access to the personal grievance adjudication procedure and whether they conflict with the principles of natural justice. Following chapters will discuss in some detail whether the personal grievance adjudication process complied with natural justice principles. Three different methods will be used in this thesis to determine whether the principles of natural justice have been complied with and whether the intentions of the government of the day had been met. Chapter Four will outline the methodology used to examine the whole process of adjudication and its impact on users.

[263] *Employment Contracts Act 1991,* s 105. See, for example, *Bartlett v Lawson Williams Ltd* (Unreported, Employment Court, Auckland, Finnigan J, 9 May 1997, AEC 42/97).

CHAPTER 4

Chapter 4

METHODOLOGY

4.1 INTRODUCTION

4.1.1 OVERVIEW

This chapter looks at the methodology used to collect and analyse data, and the reasons why these methods were used to gather information. Data collection was divided into three sections:

- Analysis of all 1997 personal grievance and related cost decisions was conducted by the creation of a database which recorded all adjudicated decisions for that year;
- Interviews with the Employment Tribunal adjudicators were conducted to determine what their experiences had been and to ascertain their opinions regarding the adjudication process and its effectiveness in resolving personal grievances; and
- To determine the effectiveness of the adjudication system, a survey of participants in 150 personal grievance cases, which were heard by the Employment Tribunal in 1997, was conducted.

This chapter is structured according to these three methods of investigation, and outlines the methodology used. This addresses the thesis questions; to investigate the experiences

of participants using the personal grievance adjudication procedure, and to identify the effective features and negative aspects of the process.[1]

As sociological methodology was new to me, I decided that a seminar should be held with those who possessed expertise in this area. A seminar was organised with Dr V. Nilakant, an expert qualitative researcher, and others from the Management Department, University of Canterbury. Dr Nilakant assured me that the methodology I intended to use was appropriate. However, he warned that there was a danger that the research could get out of control, and that it would be necessary to keep a tight rein on the scope of the investigation. Dr Nilakant's advice was followed by restricting the data gathering to one year; 1997, and restricting the topics being studied to personal grievances that were adjudicated under the *Employment Contracts Act 1991*. The reason why 1997 was decided as a representative year is discussed in 4.1.3 below.

4.1.2 Methods Used to Collect Data

As I wanted to examine the experiences of people using the Employment Tribunal under the *Employment Contracts Act 1991*, it was necessary to take a flexible approach that involved seeking information from different sources;[2] that is, decisions of the Employment Tribunal, interviews with adjudicators, and surveys of participants in personal grievances.

Legal decisions and the issues that arose from them were considered, but the collection of data relating to the opinions of users of the system and the operation of the Employment Tribunal involved a more sociological approach. Thus, due to the nature of the

[1] For discussion on the thesis questions, see Chapter 1.1 Introduction.

information being studied, this thesis used both quantitative and qualitative research methods. Quantitative study of the data from Employment Tribunal decisions involves enquiring into a social or human problem by studying relationships between numeric variables.[3] This generally uses a representative sample that can be generalised and applied to a parent population, in this case an entire year was studied rather than a random sample.[4] This supports a broader perception of the Tribunal's decisions as a whole.[5]

In contrast, qualitative research methods involve examining a social or human problem, taking a holistic approach based on recording the words and reporting the views of participants, conducted in a natural setting.[6] Qualitative research therefore involves collecting richly detailed information from participants and using the detailed information collected to support and develop theories. Qualitative methods are used as a way of extrapolating findings or responses in relation to the theory being tested.[7] The detailed interviews with Employment Tribunal adjudicators are thus an example of qualitative research. The qualitative analysis was used to determine what people's experiences had been. For example, adjudicators' opinions were being sought to identify their ideas for future dispute resolution procedures.

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[2] J Morris OBE, *Women's Access to Legal Services* Law Commission (June 1999); K Macdonald and C Tipton, 'Using Documents' in N Gilbert (ed) *Researching Social Life* (1993) 199.
[3] J Creswell, *Research Design* (1994) 2.
[4] J Brannen, 'Combining Qualitative and Quantitative Approaches: An Overview' in J Brennan (ed) *Mixing Methods: Qualitative and Quantitative Research* (1995) 8.
[5] J Creswell, *Research Design* (1994) 117.
[6] Ibid 2.
[7] J Brannen, 'Combining Qualitative and Quantitative Approaches: An Overview' in J Brennan (ed) *Mixing Methods: Qualitative and Quantitative Research* (1995) 9.

Previous research undertaken in New Zealand in this area has been largely quantitative, and has not focussed on the perceptions of participants.[8] My intention was to make the data 'speak', that is, to concentrate on the experiences and recollections of individuals. Thus, people's perceptions of the system and the appropriateness of adjudication in personal grievances was an important goal of the data gathering process. Whether applicants and respondents were satisfied, both with the process itself and its outcome, were questions that had not previously been asked of participants.[9] Also, whether or not counsel and advocates thought adjudication worked and how it could be improved and whether or not parties were satisfied with the standard of representation they received were significant questions to ask. Determining whether self-representatives believed that the process had worked for them and whether or not the adjudicators had assisted them adequately during the process was a question that had not previously been asked. This is important because it could affect access issues.

Research conducted in Britain by Jill Earnshaw, under British employment legislation, looked at their Industrial Tribunal system.[10] Earnshaw's work and examining how it had been conducted assisted with the development and utilisation of the system that I used. Earnshaw examined Industrial Tribunal Decisions, interview case studies and an analysis of company documentation.[11] Earnshaw, however, concentrated on specific industries (hotels and catering, transport, and engineering) whereas I wished to examine personal

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[8] R Harbridge, 'Bargaining in the Employment Contracts Act: An Overview' in R Harbridge (ed) *Employment Contracts" New Zealand Experiences* (1993); I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 NZJIR 365; Department of Labour, Industrial Relations Service, *Survey of Labour Market Adjustment Under the Employment Contracts Act* (August 1997).
[9] Ibid.
[10] J Earnshaw, J Goodman, R Harrison, M Marchington, *Industrial Tribunals, Workplace Disciplinary Procedures and Employment Practice,* Department of Trade and Industry, Employment Relations Research Series No. 2 (1998).
[11] Ibid 9.

grievance decisions across all areas and to interview Employment Tribunal Members to ascertain their views. Telephone discussions with Jill Earnshaw helped to consolidate in my mind the approach which I had chosen to follow.

Earlier researchers in Britain experienced major difficulties in accessing adjudicators taking part in the system.[12] In contrast, I found the Employment Tribunal Chief and Members were very willing to make themselves available to participate in the research project. Although decisions made during mediation are privileged, as provided in the legislation, I had ready access to cases decided at adjudication as they were reported in the New Zealand Employment Tribunal Decisions.[13]

I thought I would have some difficulty in setting aside my own prior assumptions about the adjudication process. As I had worked both for a union, and in the Public Service drafting employment legislation, I had very strong preconceived ideas on what was an appropriate method to resolve personal grievances. However, I found that I could quite easily set my own ideas aside when required. During the interview process with adjudicators my previous experience on both sides had a positive effect and enabled me to discuss the topics at issue easily. This first followed the analysis of the Tribunal's decisions for 1997.

4.2.2 WHY ONE YEAR WAS SELECTED

The reason one year was chosen as a representative sample was based on cost, financial constraints, allocation of resources, and time. As there were a considerable number of personal grievances which were adjudicated during the operation of the *Employment*

[12] L Dickens, M Jones, B Weekes, M Hart, *Dismissed* (1985).

Contracts Act 1991, it was impracticable study all personal grievances which had occurred since 1991. It was therefore more reasonable to study what had occurred during one year of adjudication decisions. In 1997 there were 656 decisions of the Employment Tribunal, 407 of which were personal grievances.[14] By that year, all personal grievances that had arisen under the *Labour Relations Act 1987* had been resolved. Any later year may have meant that the newer cases had not been decided due to the backlog of hearings of cases; consequently only personal grievances occurring during the operation of the *Employment Contracts Act 1991* were considered. My research commenced prior to the passage of the *Employment Relations Act 2000*. In fact many of the cases taken in 1998 were not resolved at the commencement of the *Employment Relations Act 2000*, and were subsequently resolved by the Employment Relations Authority, which had different functions.

4.2 Case Analysis of All Personal Grievance and Related Cost Decisions Adjudicated in 1997

4.2.1 Introduction

To determine whether or not the adjudication system worked for those who participated in personal grievances in 1997, it was necessary to consider the range of parties involved

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[13] *Employment Contracts Act 1991*, s 37.

[14] Figures were obtained from Department of Labour Annual reports on the number of personal grievances which occurred during various years during which the *Employment Contracts Act 1991* was in operation. The financial year for Government departments ends on 30 June so all figures for years obtained relate to the year ending 30 June. In 1993, the Employment Tribunal adjudicated 544 cases, 366 of which were personal grievances. In 1994, the Employment Tribunal heard 776 cases, 576 of which were personal grievances. In 1995 the Employment Tribunal heard 676 cases, 510 of which were personal grievances. In 1996 the Employment Tribunal heard 617 cases, 442 of which were personal grievances. In 1997, the Employment Tribunal heard 580 cases, 404 of which were personal grievances. In 1998 the Employment Tribunal heard 815 cases, 470 of which were personal grievances. In 1999 the Employment Tribunal heard 873 cases, 517 of which were personal grievances. In 2000 the Employment Tribunal heard 998 cases, 603 of which were personal grievances. Since 1998 the figures obtained from the Department of Labour Annual Reports do not differentiate between substantive hearings and decisions on costs. The 407 personal

in personal grievances: their gender, location, type of occupation, nature of representation and remedies sought and granted. To assist with answering the research questions by interpreting the information contained in decided personal grievance decisions a database which examined all the relevant decisions of that year was established.

My previous background as a union advocate and public service manager and solicitor helped me to determine what some of the issues were for participants in personal grievances. For example, I was aware that for female applicants the issues raised would be different from males, and the cost involved for both genders could have a huge impact on whether or not a case was taken in the first place. Many employees were scared of the legal process, even to the extent of not wishing to take a personal grievance under the old *Labour Relations Act 1987*. Consequently, when a more formal adjudication process was introduced under the *Employment Contracts Act 1991*, it was more likely that employees would have been reluctant to bring a claim due to the nature of the procedure itself and potential costs incurred. My experience in the public service through involvement with drafting the *Employment Contracts Act 1991*, personal grievance decisions, and ongoing contact with union officials and representatives ensured that my familiarity of the political and access issues remained current. I was very aware, both from lobbyists and from the writing of professionals of the day, what many of the issues in reaction to the *Employment Contacts Act 1991* were. These factors helped me to determine what information was pertinent to obtain from the cases.

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grievance and related costs decisions recorded on my database relate to the year of decisions recorded in Employment Tribunal reports.

4.2.2 METHOD

4.2.2 (A) MICROSOFT ACCESS DATABASE 1

The Microsoft Access database programme was used to record all the Employment Tribunal personal grievance and related costs decisions of 1997. Access was chosen as it was compatible with Zoom text, a programme for enlarging print that I used. Further, Access can be used for the production of statistical information derived from the database. I originally devised twenty-six data categories for each case. The data categories were later refined to ensure that appropriate information could be collected.[15]

The first issue with creating the database was to determine what factors I wished to highlight from each decision. Of particular interest, for example, were the types of occupations that may have tended to reappear; the question being whether particular types of workers employed in certain occupations were likely to reappear as grievants. It is possible that particular industries were more susceptible to personal grievances being taken against them either due to the nature of the industry or industrial relations practices within either the company or industry.

There were problems with establishing the database. The computer company that helped set up the database, Pulse Data International, was familiar with using the Access programme, but only in relation to using it for the collection of marketing and sales data. As I am a person with a significant vision impairment, problems arose when it was discovered that Access was not capable of working effectively with my talking computer programme, JAWS. This therefore meant relying on visual display, which caused practical difficulties with the layout and volume of information; moving data around the

database was not an easy task. During the Christmas period, when the Law Department's computer system was being altered, approximately 110 case entries with all the component details were lost from the database and required re-entering, a time consuming process as it meant rereading all 110 cases and re-entering the relevant information from them. This was a good lesson in the need to back up all important data and documents! As I experienced many practical problems with Access due to the manner in which the information was presented on the screen, I required constant help with entering the information on to the database, a process that caused considerable personal irritation. Information presented in narrow columns can be very difficult to discern for a person with a vision disability. Although the new version of JAWS will speak out the information on the screen, it is very hard to follow as it is unable to read across the screen in a meaningful manner. This therefore meant relying on a research worker to assist with this process which caused some personal anxiety to me as I am not comfortable having to rely on others for assistance. Further assistance was required to transfer data into the Statistical Package for the Social Sciences (SPSS) for further statistical analysis of key relationships.

There were further difficulties related to reading the actual decisions. The Employment Tribunal produced no template for adjudicators on how to write decisions. Consequently, decisions were written differently depending on which adjudicator had written them. The Chief of the Tribunal's view of this was that adjudicators occupied senior positions and should all be capable of writing their decisions in a clear manner without a template.[16]

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[15] See Appendix 1.
[16] Personal correspondence with Alistair Dumbleton, Chief of the Employment Tribunal, 31 October 2004.

4.2.3 ANALYSIS

The reason for conducting the analysis of cases was to attempt to determine which factors affected the procedure of cases and their outcomes. It was significant to analyse what type of employee took a personal grievance, their occupation, gender, what area they lived in, how they were represented and the consequent outcome of the case. Another factor which may have affected the nature of the claim and how much was sought and granted could have depended on the type of representation provided. The impact of costs sought and granted could likewise have influenced the rationality of claims made. Further questions to consider related to the types of occupational class that employees belonged to; who had more propensity to take a personal grievance?

The questions asked from the analysis of cases in 1997 arose from the nature of the research topic itself and had direct links between access to justice, affordability and ease of process of adjudication. The questions also arose from my personal experience of adjudication itself and from issues raised generally by participants on both sides of the personal grievance resolution process.

4.2.3 (A) TABLES

Due to the large scope of these variables, the most illustrative way of recording information was by using tables. To understand what might influence the outcome for each case, it was necessary to construct a series of questions which focussed on component variables in each decision. In order to the do this, the following categories were constructed to derive the most useful information from each decision: type of personal grievance, location, gender of parties, type of representation, remedies sought

and granted, costs sought and granted, availability of legal aid, delay and other procedural issues.

Within this framework, a further distinction was made between types of employees. To illustrate this distinction, the method of categorising employees was that used by the New Zealand census.[17] As a result of questions asked from each decision it was possible to determine which class of employee took more personal grievances, where they came from, what their representation was and outcomes obtained. Individually, the factors listed above may have had little or some impact on the outcome of a personal grievance, however, linkages made between the variable factors was of more significance. These relationships are outlined in the tables of Chapter Five. For example, did a professional public service female union member have more likelihood of obtaining a satisfactory remedy than a general male worker employee from Auckland? If it could not be said that all female employees were more likely to succeed than all male employees, was there a combination of other factors which impacted on the outcome of the personal grievance.

Note that due to sample size and nature of the information collected, figures in all tables have been rounded, therefore in some instances figures may not necessarily total 100 percent. In some instances there may also be missing data which was not recorded in personal grievance decisions. For this reason total sample size is not always 407. In cases where the sample size does not total 407 for a significant reason, this is discussed in the accompanying text. In order to gain the maximum statistical understanding of the tables in Chapter Five a statistician was consulted who indicated that significance testing and regression analysis contributed little to the analysis of the data as while some results

could be generalized to larger populations i.e., of significance less than .05, few of the relationships had strong correlations i.e., the value of Somer's d was often close to zero – a relationship of less than .3 would be considered weak.

4.3 INTERVIEWS WITH EMPLOYMENT TRIBUNAL ADJUDICATORS

4.3.1 INTRODUCTION

This section outlines how the process of interviewing Employment Tribunal adjudicators was devised, and considers the issues involved with establishing an appropriate list of questions for interviewees. Adjudicators were asked whether they thought that the system under which the Employment Tribunal operated was appropriate and fair, and if not, what would a suitable alternative be? Much criticism was made by researchers on the procedures contained in the *Employment Contracts Act 1991*, but the views of adjudicators have never been sought, although some of them have written on the topic in various articles.[18]

Although sociological approaches to narratives in interviews are becoming more common, this was not the focus of this PhD as answers to specific questions were also

[17] However, the NZ census classifications cross-cut industry, so there are important sectoral groups not revealed by this categorization; for example the health sector. For those who are interested in particular sectors, refer to Appendix IX where tables with this analysis are presented.
[18] W R C Gardiner, 'The Employment Tribunal: A Report From The Trenches' (1998); I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 NZJIR 365.

being sought. There was therefore to some extent a cross-over between qualitative and quantitative research methods.[19]

The interviews were conducted in early 2001. Although the passing of five years (since 1997) could possibly have had an impact on the accuracy of the responses through selective recollection, the purpose of the interviews was not to inquire into an individual case but to understand more about the process of decision making. It is important to note that the personal grievance procedure remained operational until 2000. General attitudes and impressions of those who had experienced the adjudication process were sought, either as applicant, respondent, representative or adjudicator. What was most valued was their perceptions of the adjudication process itself, which remained in operational until after 2000 to deal with the backlog of personal grievance claims.[20] It was therefore reasonable to assume that due to the substantial backlog of personal grievance claims under the old legislation, many of the adjudicators interviewed would still be using the old system. It was explained to those who used the system in their professional capacity that any survey or interview sought their generalized views of the system and not their perceptions of individual cases. When considering how to analyse the data from participants in the personal grievance process and where they fitted into the operation of personal grievances, the approach by Marc Galanter was considered. In respect of the parties as 'one shotters', in the terms of Galanter, the engagement with the tribunal system was more likely than not to have been a significant event in the participants' lives and in consequence their impressions of the system are unlikely to have significantly

[19] This is explained in more detail below in 4.3.2.
[20] Section 249 of the *Employment Relations Act 2000* stated that it would remain in operation until all personal grievance decisions lodged under the old legislation had been heard by the Employment Tribunal.

diminished.[21] The procedural familiarity of repeat participants compensates for loss of detail over time. Research into the nature of memory indicates that all people will remember less detail over time and the details they remember will relate to what they think was important during the period since the initial event – memories that are rehearsed and stay relevant to key interests will be retained. This makes the data harder to analyse and conclusions are speculative rather than identifying systematic differences within the groups.[22] The use of cases from 1997 was merely a sampling device to ensure a manageable amount of data was collected within the limited of a PhD thesis. Data from the 1997 cases could not be linked to comments by adjudicators or participants in the survey for reasons of confidentiality.

4.3.1(A) CONFIDENTIALITY

I considered that it was essential that adjudicators could trust me. If they did not, they would be unwilling to participate openly and provide the sort of information I was seeking. Adjudicators were open and happy to talk on an anonymous basis; it was therefore necessary for me to assure them that confidentiality would be maintained. I did this in writing, but also at the time of the interviews. Many adjudicators showed some concern that comments they made would not be linked to them personally. One reason why adjudicators sought assurance about confidentiality related to previous research that they had participated in. Previous comments made by particular adjudicators, they stated, had been included in papers and linked to particular adjudicators. A further concern was that comments previously made had been revealed at a conference and linked to

[21] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95–160.
[22] B A Misztal, *Theories of Social Remembering* (2003), 53.

particular individuals. I reassured adjudicators that I would not link comments to a particular person.

4.3.1(B) CREDIBILITY

I felt happy about people asking questions regarding the research itself. I was able to discuss how I had devised the study and what I would do with the information they provided. I also explained that the interviews themselves were raising new issues that I would like to research further in the future. Many adjudicators felt happy about discussing with me what other areas they thought were worth researching and how to develop the current study further.

My experience working for a union and working for the Public Service provided me with some credibility. I knew adjudicators from a union background as I had worked with them; likewise, I had also met many of the adjudicators who had an employer-based background in my work in the public service. As many of the adjudicators were former lawyers, my experience as a lawyer in the Public Service lent credibility to the study.

The study also gained credibility by discussions between adjudicators. Those who had been interviewed passed on the news to future interviewees. The support I had from the Chief of the Employment Tribunal also provided my work with credibility. Alistair Dumbleton, the Chief of the Tribunal, sent letters to all adjudicators supporting the research and encouraging them to participate in it. This therefore opened the door to ensuring that adjudicators would be willing to take part in the process. However, it should be stated here, that one adjudicator was not willing to participate in the interview process. That adjudicator advised that the process had taken too long and that now they were a

member of the new Employment Relations Authority. As a result, the adjudicator did not want to look back to their time with the Employment Tribunal. I was also able to determine through discussions with that adjudicator that a further reason why they were not enthusiastic about participating was due to information being revealed after participation in previous research.

4.3.2 METHOD

The nature of the thesis questions and the issues which arose from them largely determined the methodological approach adopted. When holding discussions with adjudicators, it was anticipated from personal experience of discussions with individuals and from political knowledge of the issues concerned that adjudicators would feel happier if they were given the opportunity to talk freely, and hence a more qualitative approach was taken to the interviews to allow for this, and for the maximum amount of information to be obtained. However, some of the questions which needed to be asked to determine the amount of, for example, time spent on administrative matters, were short and very straightforward. It was possible to illustrate the responses to such questions most effectively using tables. This combination of qualitative and quantitative methods has already been discussed by experts in the area and shows that a mixture of methods may illustrate more accurately the true nature of a situation which includes a variety of participants and a range of data to be examined.[23] As Elliott explains:

> …it is not *necessarily* the case that qualitative material will be interpreted and presented in a textual form and conversely that quantitative material will be analysed solely using statistical techniques… This means there is already some blurring at the boundaries between the two clusters of techniques… In practice, researchers rarely make explicit the philosophy that lies behind the methods they choose and this is particularly true of those who adopt a quantitative approach. Rather, decisions about the techniques that will be adopted to answer a particular research question are more likely to be a product of the researcher's own expertise and a notion of the appropriate

[23] Jane Elliott, *Using Narrative in Social Research* (2006), Ch 10.

> way of gaining relevant evidence or data about a particular substantive question.[24] (emphasis in original).

4.3.2 (A) HOW THE QUESTIONS WERE FORMULATED

The questions were formulated from the information that was contained on the database. Issues began to appear from the information that had been collected, including the standard of representation, the level of compensation awarded and costs. Chapter Two also provided ideas for formulating questions, particularly in relation to the political development of the system.

Adjudicators' opinions had not previously been obtained in research conducted by others.[25] I was therefore very curious to find out what adjudicators' views of the process were, whether it worked, and if not what would be an appropriate alternative.

The questions were divided into five categories: process, types of action, parties, representation, and costs. The adjudication process itself was considered a significant area about which to ask questions as the nature of the procedure could have proved to be a barrier to accessing the system. Bearing in mind the political rhetoric that occurred during the passage of the Employment Contracts Bill, whether the legislation had fulfilled the political aspirations of its proponents had to be examined.[26] It was also useful to try and determine whether or not the process contained in the Act actually worked for all parties. I was interested in the effects the type of action or the occupation and background of the applicant or respondent had on the attitude and manner in which adjudicators operated. I wanted to know whether or not the manner in which the parties operated affected how cases were heard, and what adjudicators' attitudes were towards the parties.

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[24] Ibid 172.
[25] See above n 2.

For example, was there a perceived power imbalance between the parties and if so, how was this remedied? It was possible that the occupation of an applicant or respondent could have affected how the adjudicator conducted the proceedings.

Adjudicators may also have had varying perceptions over the expertise of representatives. For example, were counsel more skilled in presentation style and content than advocates? The presentation standard may have affected the attitude of the adjudicator. I investigated whether the cost involved in bringing a personal grievance was a barrier to taking a case. The costs included representation costs, lodging fees, time, and possible costs awarded against the unsuccessful party. The level of potential costs could act as a barrier to applicants taking a claim of personal grievance. Which issues adjudicators took into account when awarding costs were relevant questions. It was important to determine what approach was being taken and whether or not adjudicators were following case law or applying their own interpretation as to how the legal position should be interpreted.

In the case of self-representatives, I wanted to know whether adjudicators thought it was fair that self-represented parties could not claim for the cost of their time, whereas executive time can be awarded to parties who are represented by in-house representatives.

In cases where a party brought a case without much merit and was subsequently penalised by costs being awarded against them, was this seen as restricting access to justice on the whim of the adjudicator, or was the award of costs in this type of case determined solely by the application of legal principles? Likewise, frivolous and trivial cases could have proved a barrier for some parties. That is, a case could have been

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[26] [1991] 524 NZPD 1437; *Employment Contracts Act 1991*, s 76(c).

thrown out by an adjudicator who decided that the case was frivolous or trivial without understanding the significance of particular issues to the individual parties involved. Consequently, as the adjudicator considered the case to be either frivolous or trivial, an independent adjudicator may never have heard the case and some parties may have felt that they had been denied access to justice.

A further issue was whether those being assisted by legal aid were treated differently to other parties either prior to or during the adjudication hearing. Were there cases where adjudicators had awarded costs against a legally aided person due to exceptional circumstances? Adjudicators were asked whether they thought that this was a fair principle, and if not, what an appropriate alternative would be.

4.3.2(B) TRIAL INTERVIEW

A trial interview was conducted to ensure that the right types of questions were formulated and asked, and to confirm the responses obtained covered the areas of interest. The questions here were divided into five broad areas: process, types of action, parties, representation, and costs. The trial interview questions are attached as Appendix 2. In the process section, the questions were designed to discover how adjudicators themselves viewed the procedure and whether or not it was effective. The second block of questions related to the types of action being heard and whether or not this had a direct effect on the adjudicator hearing the case. The third block of questions related to the parties themselves, who they were, what their occupation was, their gender and so on, to determine whether or not these factors had an effect on how parties were viewed by adjudicators. The fourth block of questions related to representation, whether or not the parties were represented, who by, or if they were self-represented whether this had an effect on how the adjudicator conducted the proceedings and viewed the substance of the

case. The fifth block of questions related to costs, the first series of questions relating to whether or not the cost of bringing a personal grievance was a barrier to justice. The questions then focussed on the award of costs against parties to a personal grievance and discussed the impact which legal aid would have had in these cases.

After determining the questions to ask, a trial interview was conducted with one of the Christchurch adjudicators. The adjudicator in question was very helpful, open and willing to participate in the trial. After the interview, the questions were reformulated; some deleted, and additions and amendments made to achieve greater clarity and precision.[27] When the main bulk of adjudicators were interviewed, I re-interviewed the person who had participated in the trial to ask any amended questions.

4.3.2(C) HOW THE INTERVIEWS WERE ORGANISED

The Chief of the Employment Tribunal supplied a list of all adjudicators/mediators holding a dual warrant, who decided cases in 1997. An initial letter, together with the study proposal was forwarded to all adjudicators inviting them to participate in the research. Unfortunately, some adjudicators could not be reached as they had already left New Zealand to work in Australia. Follow-up letters were sent to all adjudicators in New Zealand attempting to establish interview times. This process was largely unproductive as few adjudicators responded to the letters.

Telephone contact was then made with all three Employment Tribunal offices in an attempt to set up interview times. Office staff were sometimes unhelpful as they stated that they were not in a position to set dates and times as the adjudicators might be taking

[27] See Appendix III for the trial questions and Appendix IV for the final questions.

part in hearings. It was therefore often necessary to talk to the adjudicators directly to give them a choice of times and to avoid the setting of interview slots at times when a hearing was taking place.

Copies of the questions were forwarded to adjudicators prior to the interview taking place. As there were a significant number of questions, some of which required some detailed consideration, it was essential to enable participants to prepare for the interviews and to allow them to answer the questions comprehensively.

It was possible for me to set up interviews in Auckland and Wellington over a four-day period in each location. In Christchurch, I conducted the interviews at the Christchurch Employment Tribunal Office, and one adjudicator came to my office to be interviewed. There were some complications involved with the Dunedin interviews. Dates and times were established, however, close to the interview times, their secretary rang to advise that the two adjudicators had been required to attend a conference at the interview time. It was therefore necessary to conduct telephone interviews with the Dunedin adjudicators. A telephone interview was also conducted with one of the Wellington adjudicators. On the date of the prearranged interview, it was necessary for the adjudicator to attend an emergency mediation, consequently, the interview had to be rearranged. In this instance the interview progressed smoothly as the adjudicator had previously prepared written responses. However, there was a complication with one of the telephone interviews where the conversation was taped by attaching a microphone to the telephone. As there was a computer turned on in my office, this created strong interference making it impossible to clearly hear the adjudicator's comments. Consequently, the telephone interview had to be repeated. Luckily, the adjudicator in question did not object to this process and the second running of the interview passed very smoothly.

News of what had happened with telephone interviews, and how things had progressed in other areas was passed on between adjudicators throughout the country. Consequently, I found that when I travelled to a new location, adjudicators who I had not met before knew quite a lot about me and the progress of the interviews. Adjudicators were very friendly and helpful and what had occurred in previous interviews appeared to encourage adjudicators to participate freely.

In all locations, the interviews were conducted in small interview or meeting rooms. In one location, a suggestion was made that the interviews take place in an open plan office. As the interviews were being taped, this would not have been a suitable option. As a result, interviews were either conducted in the office of the adjudicator, or in a meeting room that had previously been organised by the office staff. Surroundings were always comfortable and relaxed, with cups of tea, coffee and biscuits being provided, which assisted with encouraging the participants to feel at ease and respond to questions freely. On one occasion a maintenance worker had to conduct work in the office we had been meeting in; it was therefore necessary to shift to another office.

4.3.2(D) TAPING OF INTERVIEWS

All interviews, whether conducted face to face or by telephone, were taped. It was considered that as the adjudicators were accustomed to having their hearings taped, there would be no objections to this process; it would be easier for the participants to forget that taping was taking place and speak freely.

As I am a person with a significant vision impairment, the alternative to taping would have been to take a lap top computer to the interviews. As the computer has a large print

display, this could have been disruptive to the progress of the interview and may have caused participants to hesitate to watch what was being written. A further complication could have been a restriction on the speed and coherence of the interview. It was likely that adjudicators would speak more slowly, despite my fast typing speed, to ensure that I was keeping up with their comments.

I offered to return the tapes to adjudicators once they had been transcribed, however no one took up that offer. I assured all adjudicators that the tapes would not be broadcast or passed to any other person, except the person who was transcribing the tapes.

Transcription of the tapes was a time consuming process. One adjudicator normally used one ninety-minute tape. However, in two instances the adjudicators used more than one tape. Each tape took many hours to transcribe and some adjudicators were more difficult to transcribe than others. Those who stuck to the format of the questions were easier, but sometimes, they jumped back to previous questions, and included material that had not been covered in the questions. The transcription was carried out partly by myself, and by two research assistants, one of whom had a keen interest in the topic.

I did not discourage interviewees from deviating from the questions and often it was necessary to bring them back to the topic later on. I considered their experiences and perspectives on varying employment and legal issues to be of value, and therefore I participated in discussions with them on matters that the interviewees raised even though these matters had not been included in the list of questions. I did not discourage interviewees from straying from the particular question in hand, provided they eventually answered what had been asked. This additional, opportunistic information was of great value and is one of the advantages of face-to-face interview methods.

In addition to the interviews, two adjudicators provided written answers to the questions, and one also forwarded a written response by email. Most adjudicators had prepared their responses and had taken considerable time to fully consider their answers. Adjudicators were generally very open in their approach to me and one actually stated that the process was therapeutic. Adjudicators were pleased that somebody was interested in their opinion and happy that somebody was taking the trouble to seek their views.

4.3.3 Analysis

*4.4.3 (a) NUD*IST*

When the information had been gathered, I decided to use the NUD*IST programme to assist with analysing the data collected. NUD*IST is an acronym for 'Non-numerical Unstructured Data Indexing, Searching and Theorising' and was created by QSR International.[28] This system was developed at La Trobe University in Melbourne, for interactive, qualitative analysis. By coding key words or phrases, this system allows qualitative data to be content analysed.

Due to past experience in the area of analysing large amounts of detailed information, Co-supervisor Dr Ramzi Addison suggested that NUD*IST would be the most appropriate tool to categorise and analyse the data. An alternative programme which was considered for data analysis was ATLAS/TI. This programme had similar qualities to NUD*IST, however it was discovered that ATLAS/TI was not appropriate for the task required.

[28] See www.qsrinternational.com.

Using NUD*IST was a challenge. Neither my Research Assistant nor I had any previous experience of using NUD*IST or any similar type of programme. Dr Addison had experience in this respect and he was able to provide initial information on how the programme worked. There was a tutorial programme provided with NUD*IST which did provide some assistance at the outset. It was difficult to determine exactly how NUD*IST operated but trial and error provided some answers and ideas on how to use NUD*IST more effectively. The difficulties I experienced when attempting to use NUD*IST related to how the information was presented on the screen. As with Access this caused major problems with JAWS, which had difficulty reading the data. Zoom Text, the enlarging programme, simply did not work with NUD*IST, and the whole system shut down. It was therefore necessary for me to attempt to build a picture in my head of what was on the screen as I didn't have any real access to what was there. The difficulties for my research assistant related to the tutorial not being terribly explicit. It was difficult to determine what was meant and basically the learning process was a series of attempts to use the system. The research assistant who dealt with NUD*IST was very aware that computer expertise was not her main strength. She took the view that there were many tasks that it was necessary for us to perform manually which it may have been possible to achieve in a more efficient way. However, the information provided with the programme was not explicit enough for inexperienced users and the research assistant concerned did not have that degree of expertise in using this type of computer programme. Her strengths lay more in the legal research, analysis and editing areas.

One of the first tasks was to import all the information from the interviews with Employment Tribunal adjudicators into NUD*IST and build up an index tree. It was a considerable task importing the information from the interviews into the tree and

breaking it down into particular categories. The interviews themselves had five categories of questions that were then further subdivided into their individual questions. For example all the answers from all adjudicators to Category 1 which related to process were all grouped together. Hence all the individual answers to question 1.1 comprised one branch of the tree. This process was used for all five categories of questions and the answers to all questions were grouped together.

One major difficulty using NUD*IST was that we did not really know how to use the coding system effectively. Lots of the information was therefore added in manually on the computer rather than utilising automatic coding techniques. It is likely that automatic coding techniques would have been a quicker and more effective method of undertaking this task but unfortunately we were unfamiliar with their use. However, although there were some difficulties using NUD*IST, useful information was collated. Illustrative quotes were grouped together for use in various chapters and information which may have been qualitative in nature, in some instances data was presented in quantitative format. For example many adjudicators made the same statements and answers to qualitative questions and these were counted and presented as percentages.

4.4 Surveys of Participants in Personal Grievances

4.4.1 Introduction

It was decided to survey the participants and their representatives in 150 personal grievances adjudicated in 1997.

4.4.2 SURVEY SAMPLE

It was decided to survey 150 cases, a representative sample of 407 personal grievance decisions. Of 407 cases, the percentage of decisions in each region was determined. The Tribunal's jurisdiction was divided into four regions: Auckland, Hamilton, Wellington, and Christchurch. However, the Tribunal also had an office and conducted hearings in Dunedin. On some occasions, hearings were held in areas where the Tribunal had no offices, for example, Gisborne and Greymouth. Of the 407 personal grievances, 45 percent were heard in Auckland, 23 percent in Christchurch, 20 percent in Wellington, nine percent in Hamilton, and three percent in Dunedin. To survey, for example, the participants in 50 personal grievances in each of the three areas of jurisdiction would not have been representative. Therefore, the sample of 150 personal grievances translated into 67 cases to be surveyed from Auckland; 14 from Hamilton; 30 from Wellington; 34 from Christchurch; and five from Dunedin.

The survey forms were divided into categories: employer, employee, representatives for both parties, and self-representatives. Different questions were devised for all parties, as it was important to obtain the varying perceptions of the effectiveness of the system.[29]

The selection process initially involved identifying the parties from every second personal grievance case from the database, in each geographical area, and surveying all participants. It was decided to survey the participants in every second case as this involved surveying a representative sample of the total number of parties to personal grievances. Further, although the School of Law University of Canterbury agreed to cover the cost of forwarding the information to the participants selected, however the cost

[29] See Appendices V-VIII for survey questions.

of surveying the participants in all 407 cases would have been prohibitive. A further constraint was the clerical time that would have been involved in locating the participants in all personal grievances from 1997. Already, the clerical cost involved in locating the participants in 150 personal grievances was substantial. The initial system devised proved to be unsatisfactory, as in many instances it was not possible to locate a sufficient number of participants. In cases where either the Applicant or Respondent could not be traced, it was decided to survey parties from the next case on the database. In Christchurch and Wellington parties frequently had to be identified from all cases as there was an insufficient number of participants to survey using the previous formula. In particular, it proved most difficult to find a sufficient number of representatives to survey. In Christchurch and Wellington there were not enough numbers of advocates, union advocates and counsel to be surveyed. In Christchurch the surveyable number of representatives was short of seven representatives and three short in Wellington. This problem was primarily a result of a shortage of employment law specialists; many representatives appear in more than one case. Although the number of representatives was slightly below what was ideal, it nevertheless represented the true nature of representation factors in the geographical area concerned.

Locating the addresses and the correct identity of participants proved to be expensive in clerical time. In almost all cases, at least four parties had to be located. They were: applicant, respondent, two representatives and self-representatives. In locating the parties, the sources utilised were: online telephone directory;[30] yellow pages;[31] online UBD

[30] http://www.whitepages.co.nz .
[31] http://www.yellowpages.co.nz .

Business Directory;[32] Companies Office website;[33] Legal Services Directory;[34] and the Electoral Roll.[35]

However, in some instances the sources used, whilst providing names and addresses and in the case of the Electoral roll occupation of individuals, were inadequate to locate the precise person required. For example, in Hamilton there were 12 E Jones, most of whom had retired. It was therefore almost impossible to locate the correct E Jones without having to correspond with all 12 E Jones, a time consuming, expensive, and logistically difficult process. If there were a few people with the same initials, name, and similar type of occupation, contact was made with all individuals with the same name. It was a strong possibility that the correct party would have been located. In one case, the incorrect person had been surveyed. However, the person was interested in the topic and still wanted to take part in the survey. As their personal grievance had occurred after 1997 it was not possible to include their comments.

Further difficulties occurred in locating the correct participants including: people not listing their number in the telephone book; people moving either around the country or overseas; and companies ceasing to trade.

The survey was conducted by post, as to interview the number of participants involved would have been an enormous task. All parties in 150 cases were contacted, as well as their representatives. Those being surveyed were sent pre-paid envelopes to encourage them to reply. This survey was primarily quantitative in nature as it was asking specific

[32] http://www.ubd.co.nz .
[33] http://www.companies.govt.nz .
[34] http://www.brookers.co.nz; http://www.findlaw.co.nz .

short-answer questions of the parties which were related to their own views and experiences of using the personal grievance system. Some of the survey questions, however, did ask for opinions, which encouraged more detailed responses.[36] Response rates were variable, with only representatives returning enough questionnaires for firm conclusions to be drawn and further statistical analysis was inappropriate.

4.4.3 Analysis

4.4.3 (a) Microsoft Access Database 2

A second database was established to record and collate the results from the survey of participants in personal grievances. Creating the new database was a swift learning experience for myself and for my research assistant, as at the time there was little information available in either the Law Library, or any other University Libraries, on the creation of a database like this using Microsoft Access. Establishment of the new database was therefore a series of trial and error experiments. When the information on Microsoft Access did become available the creation of the new system moved more smoothly.

Ultimately, all the information collected on the survey response forms was recorded on to four new databases, initially using the questions from the survey forms and then exploring the issues that arose. The smaller databases related to each group of participants: employer; employee; representatives; and self-representatives.

While Microsoft Access is very useful for deriving statistical data there were some difficulties when attempting to measure responses to questions that were more qualitative

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[35] New Zealand Chief Electoral Office, New Zealand Electoral Roll, (Wellington: Chief Electoral Office, 2002).

in nature. As far as possible these responses were divided into similar groups and to some extent statistical data obtained. It was decided, however, that comments which individuals made were very significant, they brought the survey to life and made it possible to examine peoples' experiences and what they thought of the adjudication process. These comments were recorded and collated on Access and where possible responses that contained similar comments or views were grouped together. Quotes from individual survey participants will be used in Chapter Seven to illustrate conclusions drawn from survey information. Since one of the aims of this survey was to give "lay" participants in the process an opportunity to present their perspectives on the data this has been reported in full in spite of the limitations to conclusions created by the low response rates.

4.5 SUMMARY

Information was acquired from different sources and using different methods of collection. This is an example of triangulation, where different methods are used to study the same object of enquiry, or more than one method of data collection is used.[37] This process of triangulation enhances the validity of findings and meant that the data was being examined from a variety of angles[38] allowing varying attitudes to be included in the data collection and reasons for consistencies and inconsistencies in experiences across groups to be examined.[39] Exploratory topics of study such as this are suitable for using more than one method of investigation. Different types of information were being sought

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[36] See Appendices V-VIII for survey questions and Chapter 7 for discussion of response rates.
[37] J Brannen, 'Combining Qualitative and Quantitative Approaches: an Overview' in J Brannen (ed), *Mixing Methods Qualitative and Quantitative Research* (1995) 11; K Macdonald and C Tipton, 'Using Documents' in N Gilbert (ed), *Researching Social Life* (1993) 199; J Creswell, *Research Design* (1994) 174.
[38] A Bryman, 'Quantitative and Qualitative Research: Further Reflections on Their Integration' in J Brannen (ed) *Mixing Methods: Qualitative and Quantitative Research* (1995) 60.
[39] K Macdonald and C Tipton, 'Using Documents' in N Gilbert (ed), *Researching Social Life* (1993) 199.

from all parties taking part in the process leading to differences in method depending on the source of the information and whether it required one word answers or ticking an appropriate box, or was more exploratory and required the respondent to express an opinion. The sequential process (secondary data analysis preceded the interactive data collection) shaped the whole: some of the original intentions were unable to be met because of technical problems such as limitations of the files analysed or by the response rates to the sampling strategy. The combination of both quantitative and qualitative approaches was therefore a mechanism to provide an overall picture of the adjudication process from different angles and perspectives but the sheer size and complexity of the data collection and analysis meant that some of the strategies by which problems could be solved were not available.[40]

This overview of the study methodology has stated how the data collection was organised, the creation of the database that involved the recording of all personal grievance and related costs decisions of 1997, interviews with Employment Tribunal Adjudicators, and surveys of the participants in 150 personal grievances adjudicated in 1997. The chapter then examined the methods used to collect data and detailed the process involved with the establishment of the database, the interviews with Employment Tribunal Adjudicators, and surveys of participants in personal grievances. The chapter has therefore detailed the procedures used and hurdles that arose during the collection of data. Although some of these hurdles, such as obtaining high response rates on the survey of 150 participants in personal grievance decisions to the Tribunal, have limited the analysis of some of the data collected the data is available to guide further research. Missing data in the 407 cases from 1997 limited analysis but collecting data from a far

[40] A Bryman, 'Quantitative and Qualitative Research: Further Reflections on Their Integration' in J

smaller range of variables from more than one year may improve the ability to examine relationships between some of the variables of interest over time. Breaking data collection down into specific questions for the adjudicators based on the case data and previous research and experience proved acceptable to people with legal backgrounds. This was more manageable than designing and analyzing semi-structured interviews. Some of the analysis features of NUD*IST were virtually impossible to use for someone without full vision. Use of tables gave continuity across the chapters and supported the qualitative analysis in Chapter Six. In retrospect, it became clearer that these problems have limited the extent to which it has been possible to realize some of the advantages of triangulation of data sources. However, the thesis was designed to be exploratory in the main with the results used to develop theory rather than test hypotheses. The aim was to build theory which, if necessary, could be statistically tested by a person with greater understanding of statistical methods and this has been achieved.

Following chapters will examine conclusions drawn from the original database, details of interviews with Employment Tribunal adjudicators and their views on the operation of the Employment Tribunal adjudication system and findings from surveys. What an ideal system would be will also be discussed in later chapters.

Brannen (ed) *Mixing Methods: Qualitative and Quantitative Research* (1995) 60.

CHAPTER 5

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Chapter 5

EMPLOYMENT TRIBUNAL PERSONAL GRIEVANCE DECISIONS FOR 1997

5.1 OVERVIEW

Chapter Five examines objective data extracted from all 407 Employment Tribunal personal grievance and related costs decisions heard in 1997.[1] The chapter describes the database that was constructed to record this information and discusses relevant factors arising from the information gained, conclusions that may be drawn, and identifies potential problem areas for participants who used the personal grievance procedure. Where appropriate, it has also been useful to include quotes and information obtained from interviews with Employment Tribunal Members. While Chapter Six examines the interviews and related issues in depth, in some circumstances adjudicator's comments have assisted with interpreting the information contained in this chapter.

5.2 VALUE OF COLLECTING OBJECTIVE DATA

One of the main aims of establishing an objective database was to determine the profile of participants and their experience of the personal grievance adjudication system. It was anticipated that it would be possible to draw conclusions about aspects of the procedure

[1] In the year ending 30 June 1997, the Employment Tribunal received 5,402 applications. From those, 3,202 mediations were scheduled, 587 adjudications were scheduled and 400 adjudications were serviced. In the year ending 30 June 1998, the Employment Tribunal received 5,332 applications, and of those 3,107 mediations were scheduled and 492 adjudications were serviced. Department of Labour, Annual Reports.

itself and whether or not it worked depending on the types of applicants who used it, their occupation, whether or not they were represented, and the remedies sought and granted. It was anticipated that the database would be able to illustrate a series of patterns and trends regarding aspects of the procedure and its participants, and consequently determine whether particular factors had an impact on the outcomes of cases. The factors involved in cases that could have had an impact on outcomes included: gender of parties, occupation of applicant representation, delay, the hearing process itself, remedies and costs. Objective data from the employment tribunal adjudication decisions helped to illustrate whether the Government's objectives in creating the Employment Tribunal had been achieved, which were to make the resolution of personal grievances quick, easy, and inexpensive.[2]

5.3 Nature of Objective Information

This research examines three questions in relation to personal grievances. Firstly, what were peoples' experiences of using the adjudication system, secondly, did adjudication work for participants and thirdly whether the procedure has the potential to benefit not only policy makers, but all participants in the personal grievance adjudication system. To investigate these questions it was first necessary to determine what information would be of specific value from each decision. A list of factors I hoped to gain specific information on included:

[2] [1991] 524 NZPD 1437.

General information about personal grievances, including the:

- total number of personal grievance and related costs decisions heard in 1997;
- total number of personal grievance and related costs decisions heard in each region;
- total number of claims for each different cause of action;
- total number of claims for each different cause of action within each regional jurisdiction;
- number of claims where an alternative cause of action was listed; and
- whether or not mediation occurred.

Time factors, including the:

- average wait from an event precipitating a personal grievance to a hearing;
- average wait from an event precipitating a personal grievance to a hearing by region;
- average length of a hearing; and
- delay in receiving an adjudicator's decision.

Information relating to parties, including the:

- number of applicants/respondents;
- gender of applicants and respondents;
- number of group applications;
- occupational classification of applicants;
- type of employer; individual, company, public service department, crown entity, education or health sector, local government; and
- number of applicants legally aided.

Representation, including the:

- number of applicants and respondents represented;
- variety of representation used by applicants; e.g. counsel, advocate, union representation, self representative; and
- number of different types of representation used by respondents; e.g. counsel, advocate, employers organisation, self representative.

Adjudicators, including the:

- number of personal grievance and related costs decisions heard by each adjudicator;
- possible correlation between the gender of an adjudicator and the decisions made/remedies granted; and
- possible correlation between the background of an adjudicator and the decisions made/remedies granted.

Results of personal grievances, including the:

- success or otherwise of outcomes;
- average monetary remedies awarded;
- average monetary remedies awarded by region;
- average costs for the applicant/respondent; and
- number of reinstatements.

Before the above listed factors could accurately be analysed, it was necessary to establish a comprehensive database to categorise information contained in the adjudicated cases under the following headings:

- reference number
- additional reference number
- jurisdiction
- cause of action
- additional cause of action
- applicant
- gender of applicant
- respondent
- gender of respondent
- adjudicator

- date personal grievance occurred
- date of hearing
- length of hearing
- date of decision
- type of representative of applicant
- type of representative of respondent
- type of decision
- did mediation occur
- remedies sought
- remedies granted
- amended cause of action
- appeal sought
- applicant costs and disbursements sought
- respondent costs and disbursements sought
- applicant costs and disbursements awarded
- respondent costs and disbursements awarded
- procedural issues

As there was no set format on what type of information was to be recorded in an adjudicator's decision, it was often difficult to locate specific data.[3] For example, the details of the heads of grievance, remedies sought and granted, and mitigating factors were often dispersed throughout a decision in no apparent order. For this reason, as discussed below, many of the tables do not represent a total of 407 cases simply because the relevant data was not specified in the records of the cases. In these instances, the tables represent as many cases as it was possible to ascertain data from.

[3] Personal Correspondence with Chief of the Employment Tribunal, Alastair Dumbleton, 31 October 2004. Dumbleton stated that 'there was no format or template for writing decisions. It was all ad lib, individual stream of consciousness technique'.

5.4 DATABASE FINDINGS

5.4.1 GENERAL INFORMATION OBTAINED FROM DECISIONS

The following section contains some information obtained from general questions included in the database of all Employment Tribunal decisions for 1997.

Table 5.1: Number of Personal Grievances and Working Population in 1996[4]

	Auckland	**Hamilton**	**Wellington**	**Christchurch**	**Dunedin**	**Total**
Number of Personal Grievances	167 (41%)	34 (8%)	81 (20%)	112 (28%)	13 (3%)	407 (100%)
Working Population in 1996	488,331 (43%)	155,463 (14%)	197,148 (17%)	219,564 (19%)	84,228 (7%)	1,144,734 (100%)

Table 5.1 shows the highest number of personal grievances occurred in the Auckland registry district. However, it needs to be noted that Auckland is a significantly larger city than those in other jurisdictions with a higher number of employees and employers; consequently a higher number of personal grievances was likely.[5] Figures obtained in the 1996 Census show that the number of personal grievances occurring in each centre reflected the working population base.[6] The proportionally higher number of personal grievances in Christchurch may have been due to the nature of the workforce in the

[4] From 1996 Census statistics, see http://www2.stats.govt.nz/domino/external/pasfull/pasfull.nsf/0/ 4c2567ef00247c6acc256b 6b0078645b/$FILE/ALLTABLS.xls

[5] For discussion on employment tribunal adjudication jurisdictional areas, see Chapter 2.5, para 2. Also see W R C Gardiner, *The Employment Tribunal (A Report From the Trenches)* 13 May 1998, 4, where it was stated that Auckland Registry catered for cases from Taupo north and dealt with 50 percent of the workload, Wellington Tribunal Registry which took in Nelson bore 28 percent of the workload, and the Christchurch/Dunedin Registry dealt with 22 percent of the workload. These figures effectively reflected the population base of the various geographical areas.

[6] See Tables by region: http://www.stats.govt.nz/domino/external/web/ExtraPages.nsf/htmldocs/ Standard+ Regional+Tables+Census+1996+-+Map.

Canterbury region.[7] The predominant types of employees in Canterbury were trades and service and sales. At this time, those two occupational classes were still fairly highly organised and were perhaps more likely to take a personal grievance. Also, the Canterbury Adjudication Service had a high frequency of hearings and determining the results of personal grievances.[8]

Table 5.2: Cause of Action by Jurisdiction

Cause of Action	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Total
Unjustifiable Dismissal	139 (47%)	32 (11%)	44 (15%)	71 (24%)	11 (4%)	297 (100%)
Unjustifiable Constructive Dismissal	10 (30%)	2 (6%)	9 (27%)	11 (33%)	1 (3%)	33 (100%)
Unjustifiable Action	2 (10%)	0 (0%)	8 (38%)	10 (48%)	1 (5%)	21 (100%)
Other[9]	14 (33%)	0 (0%)	18 (42%)	11 (26%)	0 (0%)	43 (100%)
Total Cases[10]	165	34	79	103	13	394

Significance: .000, Somers' D: .057

Clearly, the most common cause of action during 1997 was direct unjustifiable dismissal. In contrast, there were a significantly smaller number of constructive dismissals. Although constructive dismissals are recorded as dismissals, they stem from an

[7] See Table 5.5 below.
[8] See Table 5.1 above.
[9] 'Other' includes: Procedural fairness; parental leave; strike out proceedings; costs; out of time and multiple causes of action. These categories represented a small number of applicants; it was therefore more expedient to group them into one category of 'other'.
[10] The total numbers of these personal grievances, and those throughout this chapter, do not add up to the same totals as Table 5.1 for a number of reasons: in this case some personal grievances may have several different causes of action, so are not included in this table. Also in some instances the cause of action was unclear, or undefined.

employer's repudiatory action that left the employee believing that he or she had no alternative than to resignation.[11] The reason that there were fewer constructive dismissals may have been because such claims are more difficult to establish. In constructive dismissal cases, the grievant bears the additional evidential burden of proving that an actual dismissal took place and such cases are notoriously difficult for applicants.[12]

5.4.2 Information Relating to Parties

Tables 5.3 to 5.8 contain general information regarding the parties to personal grievance proceedings and their occupational class. Factors to consider included the gender of personal grievants, the type of employment applicants were engaged in, and whether or not any employment category was more predominant. Previous research has indicated the types of industries where personal grievances tended to predominate.[13] However, the nature of the employment that parties were engaged in has not previously been examined.[14]

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[11] See Chapter 2, n 113 and accompanying text.

[12] See *Mazengarb's Employment Law* (5th ed, 2000) Part III.19 and ch 2, para.3.3.1 above for brief discussion on the shifting burden of proof. The elements that an employee had to show for claims of constructive dismissal were outlined in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, where the Court of Appeal held that constructive dismissal could mean, but was not restricted to, three different types of action by an employer. These were: where the employer gives an employee a choice between resigning or being dismissed; where an employer has followed a course of conduct deliberately intending to coerce the employee into resigning; or where a breach of duty by the employer leads the employee to resign.

[13] Ian McAndrew, 'Determinations of the Employment Relations Authority' (2002) 27(3) *New Zealand Journal of Industrial Relations*, 323, 328-9. Industrial Relations Service, *Survey of Labour Market Adjustment Under the Employment Contracts Act*, August 1997, 79.

[14] See Table 5.8 and related text.

Table 5.3: Gender of Applicant taking a Personal Grievance

Gender	Percentage of Personal Grievants	Number of Personal Grievances	Percentage of Working Population[15]
Male	64%	260	55%
Female	33%	133	45%
Both[16]	3%	14	–
Total	100%	407	100%

Table 5.3 shows that male applicants significantly outnumber females. The reasons for this generally reflect the proportion of males to females in the working population, but any further reasons for this disparity will be discussed below with Table 5.6.

Table 5.4: Gender and Type of Respondent

Gender / Type of Respondent	Percentage of Grievants	Total Grievants
Male	8%	33
Female	2%	7
Both	4%	16
Company	76%	311
Government	4%	16
Other[17]	6%	24
Total	100%	407

Similarly to Table 5.3, Table 5.4 shows that there were more male respondents than females and the vast majority of respondents were companies. Ninety-two percent of personal grievances had individual applicants who took personal grievances against their employers. Out of a total of 407 personal grievances, 375 of them were taken by individual employees against their employers. The small number remaining, 23 were taken by two employees against their employers, and four were taken by more than two.

[15] See n 23.
[16] That is where there were both male and female applicants in the same case.
[17] 'Other' includes: Board; Incorporated Society; Local Government; Polytechnic; and Trust.

This shows that most personal grievances related only to an individual's case, as opposed to being variants on a class action.[18]

5.4.3 New Zealand Census Classifications of Occupational Class of Personal Grievants

As the census contained definitions of occupational classes encompassing the whole working population, which types of employees were represented in the personal grievance statistics as a proportion of the working population indicated which types of employees were most prevalent in the personal grievance system. A comparison could then be made between the occupational classes contained in the working population and the proportion of types of employees who took personal grievances.[19]

The categories used by the census strictly focussed on the occupation of the different categories of employee. As a result, this included classes of employee who were employed in the public, health, education and voluntary sector, as well as private sector employees. In terms of statistical analysis, if correlation of Somer's D was less than 0.3 that indicates a very low relationship between the two variables. However, a very low

[18] For discussion on adjudicators' opinions regarding appropriateness of multiple applicant claims and class action, see Chapter 6.

[19] The decision to classify occupational class by the census categorisation method was reached after considerable attempts to classify the data based on the system used by McAndrew. As it was not possible to make a direct comparison between analysis of Employment Tribunal statistics as originally classified and objective census information, the categories of occupational class have therefore been recoded in order that those comparisons could be made. For the original analysis, which recognised different occupational groups, see Appendix IX. The census categories can be compared with the NZSEI classifications, see Davis, P. Jenkin, G. Coope, P. New Zealand Socio-economic Index 1996: An update and revision of the New Zealand Socio-economic Index of Occupational Status, Statistics New Zealand, Wellington, New Zealand 2003. See also Chapter 4, n 17. These confirm that legislators, administrators and mangers as a group rank highly on socio-economic indicators and similarly to associate professionals, professionals rank highest overall, clerical workers rank ahead of sales and service workers but behind tradespeople. Operators and general workers rank lowest of all on socio-economic characteristics.

significance e.g., .05 or less, indicates that some degree of relationship exists between the results and trends in the wider population.

In determining what type of employees used the adjudication procedure, it was important to discover which occupational class of employees appeared most frequently in personal grievance statistics. It was also relevant to examine whether in each jurisdictional area a particular occupational class of employees tended to predominate.

Table 5.5: Occupational Class of Applicants

NZ Census Categories of Occupational Class	Auckland	Christchurch	Dunedin	Hamilton	Wellington	Total Cases
Legislators, Administrators and Managers	17 10%	5 5%	0 0%	2 6%	12 15%	36 9%
Professionals	16 10%	14 13%	1 8%	3 9%	5 6%	39 10%
Technicians and associate professionals	33 20%	9 8%	4 31%	6 18%	5 6%	57 14%
Clerical Workers	13 8%	2 2%	0 0%	1 3%	8 10%	24 6%
Service and Sales workers	43 26%	28 5%	3 23%	7 21%	21 26%	102 25%
Agriculture and Fishery workers	6 4%	10 9%	3 23%	5 15%	5 6%	29 7%
Trades workers	15 9%	16 14%	0 0%	1 3%	4 4%	36 9%
Plant and machine operators and assemblers	12 7%	13 12%	0 0%	6 18%	10 13%	41 10%
Elementary occupations	8 5%	4 4%	0 0%	3 9%	5 5%	20 5%
Unspecified	4 2%	11 10%	2 15%	0 0%	7 9%	24 6%
Total	167 100%	112 100%	13 100%	34 100%	81 100%	407 100%

Significance: .483, Somer's D: .025

Table 5.5 shows the type of work which applicants were engaged in, rather than the industry in which they were employed. Previous research focussed on the latter, while this research was interested in the former. This shift in emphasis enabled consideration of whether the occupation of the applicant had an effect on the outcome of the personal grievance, both in terms of success rate and level of remedies awarded.[20]

Research was also undertaken by the Labour Department in 1997, which examined through surveys how the labour market was functioning under the *Employment Contracts Act 1991*.[21] The Labour Department largely focussed on bargaining and how the *Employment Contracts Act 1991* affected outcomes, as opposed to personal grievances. However, consideration was given in that survey to the broad types of industries where employees worked, rather than the types of occupation they were employed in. Industries were categorised as; primary industries, secondary industries, distribution industries and service industries.[22] The value of the Labour Department research related to industrial practice and the effects of different industries on employees. Thus, the issues that they were considering had a slightly different focus to the research conducted in this study.[23] The primary focus of this thesis is, in general terms, access to justice in the personal grievance arena and what participants' experiences were in using the adjudication system.

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[20] Examined further in Tables 5.19 and 5.20.

[21] Department of Labour, *Survey of Labour Market Adjustment Under the Employment Contracts Act*, Industrial Relations Service, August 1997.

[22] Ibid 62. Primary industries included: agriculture; forestry; fisheries; and mining. Secondary industries included manufacture and construction. Distribution industries included: electricity; gas; water; transport; and storage. Service industries included: communication; wholesale trade; retail trade; accommodation; café; rent; finance; insurance; property; business; government; administration; defence; education; health/community services; cultural/recreation services; and personal/other.

[23] Ibid 64. This table determined where various industries sourced their information. See this survey for the Department of Labour categorisation of various industries. The focus was on the industry, not the type of employment of individual employees.

It was therefore fundamental to focus on the *actual* occupational backgrounds of participants, as opposed to the *general* industry they were employed in. This allows examination of the nature of work undertaken by applicants, affording an insight into whether their occupational background affected the outcome of using the process and their experiences of it.

Table 5.6: Occupational Class and Gender of Applicant

Gender of Applicant/ Occupational Class	Female	Male	Both	Total
Legislators, Administers and Managers	6	27	3	36
	5%	10%	21%	9%
Professionals	14	25	0	39
	11%	10%	0%	10%
Technicians and associate professionals	20	36	1	57
	15%	14%	7%	14%
Clerical Workers	23	1	0	24
	17%	0%	0%	6%
Service and Sales workers	47	53	2	102
	35%	20%	14%	25%
Agriculture and Fishery workers	4	21	4	29
	3%	8%	29%	7%
Trades workers	0	33	3	36
	0%	13%	14%	9%
Plant and machine operators and assemblers	3	37	1	41
	2%	14%	0%	10%
Elementary occupations	5	14	0	19
	4%	5%	0%	5%
Unspecified Occupation	11	13	0	24
	8%	5%	0%	6%
Total	133	260	14	407
	100%	100%	100%	100%

Significance: .004, Somer's D: .089

As shown in Table 5.6, the majority of applicants taking personal grievances were male. This is disproportionate to the male/female ratio in the workforce, potentially showing a tendency for male employees to adopt a more litigious approach.[24] This is mere speculation; however, Table 5.6 still reveals some interesting statistics relating to gender and occupational class. In the clerical and sales and service occupational classes, proportionally more females than males took a personal grievance. This is not unexpected given that females outnumbered males in these occupational classes and it could be expected that their work experiences would differ.[25] Gender bias was observed by Wendy Davis in sexual harassment cases, where she found that awards of compensation under s 40(1)(c)(i) for men dismissed for sexual harassment tended to be higher than those paid to women who were sexually harassed.[26]

Conversely, in the Legislators, Administers and Managers group, males exceeded female applicants. This was an important statistic, as it could have had an impact on levels of compensation between males and females, as Legislators, Administers and Managers

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[24] Fifty-five percent of the general workforce was male, while 64 percent of personal grievances in 1997 were taken by males. See: http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/7cf46ae26dcb6800cc256a62000a2248/4c2567ef00247c6acc256b6b007863cb?OpenDocument and Table 5.3 above.

[25] According to Census information gathered in 1996, one-quarter of all females employed occupied clerical positions, while this was the occupational group for only 5.2 percent of males. See http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/7cf46ae26dcb6800cc256a62000a2248/4c2567ef00247c6acc256b6b007863cb?OpenDocument . For more detailed discussion on the types of occupational classes women are employed in, see Caroline Morris, 'An Investigation into Gender Bias in the Employment Institutions' (1996) 21, NZJIR 67, 75 and Wendy Davis, *A Feminist Perspective on Sexual harassment in Employment Law in New Zealand*, New Zealand Institute of Industrial Relations Research (1994) 41.

[26] Wendy Davis, *A Feminist Perspective on Sexual harassment in Employment Law in New Zealand*, New Zealand Institute of Industrial Relations Research (1994) 41.

may have been awarded higher levels of compensation. This is discussed later in this chapter in relation to compensation.[27]

In an analysis of the gender composition of the workforce, it is important to consider the gender balance in the public and private sectors.[28] In the public sector, the gender balance of grievants was more equal, while in the voluntary sector females outnumbered males though numbers are too small to analyse reliably. Research into the composition of the workforce in the public service from 1997 to 2000 by the State Services Commission showed that women comprised 54 percent of public service employees, compared to 45 percent in the general labour force.[29] The research also found that women occupied 30 percent of senior management roles in the public service and 17 percent of chief executive positions. Surveys completed in 2000 by the State Services Commission show that women occupied 50 percent of professional positions in the public service, 40 percent of management positions and 77 percent of clerical positions.[30] This shows that there was more equity in the public sector than in the private sector in terms of positions occupied by women.[31]

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[27] See 5.4.6(b)
[28] For further discussion, see Appendix IX.
[29] State Services Commission, 'Equal Employment Opportunities Progress in the Public Service as at 30 June 1997' and 'Equal Employment Opportunities Progress in the Public Service as at 30 June 1998'. See http://www.ssc.govt.nz/upload/downloadable_files/EEO_Progress_97.pdf and http://www.ssc.govt.nz/upload/downloadable_files/eeopr98.pdf .
[30] State Services Commission, 'State Services Commission Human Resource Capability Survey of Public Service Departments and Selected State Sector Organisations as at 30 June 2000'. See http://www.ssc.govt.nz/upload/downloadable_files/hrc_survey_2000.pdf. This was the first time that a breakdown of Public Service employees by occupation was done. This was confirmed by Jude Bleach, Senior Advisor for the State Services Commission by telephone on 2 November 2004.
[31] Public service includes public service departments and ministries, while the public sector category used in this research includes crown entities, agencies and state owned enterprises. See Appendix IX.

Table 5.7: Types of Personal Grievance per Occupational Class[32]

	Cause of Action				Total
Occupation using NZ Census categories	**Unjustifiable Dismissal**	**Unjustifiable Constructive Dismissal**	**Unjustifiable Action**	**Other**	
Legislators, Administrators and Managers	29 81%	1 3%	3 8%	3 8%	36 100%
Professionals	31 80%	1 3%	2 5%	5 13%	39 100%
Technicians, associate professionals	41 72%	6 11%	5 9%	5 9%	57 100%
Clerical workers	16 67%	4 17%	1 4%	3 13%	24 100%
Farm workers	24 83%	1 3%	1 3%	3 10%	29 100%
Trades workers	25 71%	7 20%	1 3%	2 6%	35 100%
Plant and machine operators and assemblers	33 83%	1 3%	2 5%	4 10%	40 100%
Elementary occupations	14 74%	3 16%	1 5%	1 5%	19 100%
Total	213 76%	24 9%	16 6%	26 9%	279[33] 100%

Significance: .032, Somer's D: -.065

The findings in Table 5.7 show the total number of personal grievances nationally for each head of grievance and within each occupational class. Direct unjustifiable dismissal was the most common personal grievance in all occupational classes, followed by unjustifiable constructive dismissal and then unjustifiable action. Table 5.7 also shows that there were very few constructive dismissal claims by the Legislators, Administers,

[32] For further discussion see Appendix IX.
[33] Similar to n 11, Cause of Action was often unspecified in the case data, hence the low total.

and Managers, and Professional occupational classes but numbers are so low no conclusions can be drawn. There is no obvious explanation for this, but it could have been because professional employees tend to experience less difficulty finding alternative work because of qualifications and skills. Another possibility was that the additional evidential burden of proof for claims of unjustified constructive dismissal, discussed earlier, was too difficult for an employee to meet.[34] Public sector claims were more likely to include constructive dismissal and other less common personal grievances but again low numbers limit analysis.

Table 5.8: Occupational Class of Personal Grievances compared to occupational class of the 1996 working population

Occupational Class by NZ Census Classifications	Frequency	Percent of Personal Grievances	Percent of 1996 Working Population
Legislators, Administrators, Managers	36	8.8 %	4.8 %
Professionals	39	9.6 %	8.9 %
Technicians and Associate professionals	60	14.7 %	9.0 %
Clerical workers	24	5.9 %	17.3 %
Service and Sales Workers	102	25.0 %	25.7 %
Agriculture, fishing and forestry workers	25	6.1 %	9.6 %
Trades workers	36	8.8 %	2.3 %
Plant and machine operators and assemblers	41	10.1 %	4.0 %
Elementary occupations	20	4.9 %	11.0 %
Unspecified Occupation	24	5.9%	6.8 %
Total	407	99.8%	99.4 %

[34] The elements that an employee had to show for claims of constructive dismissal were outlined in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372. See above n 12 for an outline of what the Court of Appeal held.

Table 5.8 shows each occupational class as a percentage of the 1996 working population according to the New Zealand census classifications. It then shows the percentage of these occupational classes who took personal grievances in 1997.[35] The small sample size consisting of applicants who took personal grievances is due to the relatively small number of personal grievance claims that had to be resolved by adjudication. Most personal grievance claims were resolved in mediation with a very small proportion requiring adjudication.[36] The size of the group as a whole was very small, therefore minor differences in the percentage of people who took personal grievances compared to their representation in the total occupational class group in the censes were insignificant. In this study, any difference of less than five percent was considered to be due to random error and problems in ability to code as discussed below, rather than any significant trends.

Legislators, administrators and managers comprised 4.8 percent of the working population and represented 8.8 percent of people who took personal grievances. Generally this group would have been more aware of their legal rights, and would have been more likely to articulate them in a comprehensive manner. Whilst in many circumstances they would have had limited access to union representation, they would have been more likely to have been able to purchase those services more comfortably. However, the small distinction in percentages makes it difficult to draw significant conclusions from the data which may be due to random error. The definition of this

[35] See http://www2.stats.govt.nz/domino/external/pasfull/pasfull.nsf/0/4c2567ef00247c6acc256b6b0078645b/$FILE/ALLTABLS.xls.
[36] See Chapter 2.3.2.

census group was not always clear as it included such occupations as ‘Special Interest Organisation Administrators’. Furthermore, the magnitude of the enterprise of a personal grievant was often unspecified. It was therefore difficult to accurately categorise the occupational class of the employee. For example, a case specifying ‘shop manager’ or ‘retail manager’ may have represented an employee managing one enterprise or chain of enterprises. This could have indicated that the management position was not corporate in nature, but was management of a small enterprise.

Professionals comprised similar percentages of the working population, and those who took personal grievances. This category of employee was the most straightforward to categorise due to the clarity of description of the positions analysed, and the singular nature of the positions meant they were less likely to overlap.

Technicians and associate professionals made up a significant percentage of the working population, 9 percent. In the study population, this group comprised a wide variety of occupations including pilots, managers/receptionists and radio announcers, who took 14.7 percent of personal grievances. The reason for the higher uptake may have been due to the generally high level of educational achievement, awareness of legal rights, availability of union representation and ability to financially sustain a claim if union representation was unavailable. It is less likely that this diverse occupational class was more exploited than other less qualified classes of employees. However, the diversity of the nature of the group, together with the high level of qualifications achieved could imply that these types of employees were less willing to tolerate inappropriate treatment by their employers.

Although Clerical staff comprised 17.3 percent of the working population in 1996, they took a proportionally lower percentage of personal grievance actions, 5.9 percent. The reasons for this may have been due to the nature of their employment circumstances, gender of applicants, and general lack of accessible representation.[37] Representation for this group may have appeared too expensive, difficult to organise and intimidating. Often clerical workers would have been in sole charge positions, which made employees feel vulnerable. Clerical workers who took personal grievances as far as adjudication tended to work for smaller private sector organisations, and this combined with the nature of their work could have made them more susceptible to mistreatment. Those who were defined as clerical worker by the census categorisation covered a wide range of positions. Some employees would have been highly skilled, whereas others would have received basic training. Those with higher qualifications may have been more likely to take a personal grievance, however, this may not necessarily be the case because they would have been more likely to be able to obtain alternative work more quickly. Lack of support from other employees and intimidation by employers and co-workers may provide the reason why clerical workers were less likely to take a personal grievance.[38] Further, if clerical workers were employed in the State Sector, they had little access to representation unless they chose to appoint a legal representative. On the other hand, Public Service clerical workers did have access to effective union membership and the process which they undertook to resolve personal grievances meant that it was often

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[37] Wendy Davis, *A Feminist Perspective on Sexual harassment in Employment Law in New Zealand*, New Zealand Institute of Industrial Relations Research (1994) 41.

[38] Personal experience from working in the Union Movement 1985–1988. Further understanding from working as a solicitor in the public service, in particular the Ministry of Women's Affairs as a Legal Advisor 1991–1994.

unnecessary for them to follow the formal process of dispute resolution.[39] Alternatively they may have been satisfied with their employment circumstances, or the figures may have been the result of random error because of their small numbers and diverse circumstances.

Service and Sales staff represented 25.7 percent of the workforce and accounted for 25 percent of personal grievance claims. My experience with the issues surrounding employment conditions for Service and Sales staff indicates that the employment environment for this group of employees was not always harmonious, and also indicates that they had strong representation. The union which represents this group of workers remains a strong and active organisation. However, retail staff do not generally enjoy generous employment contracts and there is no higher percentage of personal grievance.

Agriculture, fishing and forestry workers represented a significant group of employees. They appeared to have been slightly less willing to take personal grievance actions against their employer, 6.1 percent versus 9.6 percent of the working population. This may have been due to the nature of their employment, the potential closeness of their relationship to their employer, geographical spread, and non-unionisation of the workforce. Alternatively, they may have been happy in their work, or it may be due to random error. The most problematic area of this group was where agricultural workers were described as managers as it was difficult to determine the nature of the work and

[39] http://www.psa.org.nz/Campaigns/Partnership_for_Quality.aspx.

therefore where it should be classified. The size of the enterprise in this instance may also have been a significant issue which was difficult to determine from the data provided.

Whilst tradespeople comprised a small percentage of the workforce, they were slightly more likely to pursue a personal grievance. They were more likely to be organised, represented by unions and aware of their rights. Of note, it is likely that due to the decline in manufacturing and similar industries in New Zealand from the mid 90's, the proportion of employees who were tradespeople is declining as a percentage of the working population. In general, there was no difficulty with classifying this group of employees.

Surprisingly, Plant and Machine Operators only comprised 4.0 percent of the 1996 working population. However, they did constitute a slightly larger proportion of employees who were willing to take personal grievances against their employer. This could have been due to the then National governments' intentions to de-unionize the New Zealand work force, which may have resulted in employees taking a more militant approach against their employers in provocative circumstances. Further, it is more likely that this occupational class of employees was, at the time, more unionised, and therefore had access to free/relatively cheap representation.[40]

Elementary workers comprised 11 percent of the working population in the relevant year, a percent slightly higher than the proportion of grievances. General perceptions might be that this group of employees would be more militant, however, the reality could have

[40] See P Walsh and R Ryan, 'The Making of the Employment Contracts Act' in R Harbridge (ed), *Employment Contracts: New Zealand Experiences*, (1993).

been that this group was less organised and may have been adversely affected by the then government's intentions to de-unionize the workforce. Most of New Zealand's working population was employed in smaller workplaces and may have had more limited access to union membership and therefore support in taking personal grievances. It may still be the case that employees belonging to the Elementary workers category were more exploited but did not have the knowledge or financial ability to challenge the actions of their employer. Furthermore, if a less skilled employee took a personal grievance against their employer, as well as losing their income and incurring more financial hardship, they would experience further financial difficulties as if a new employment was found, this could reduce their ability to obtain higher levels of compensation.

Although it could be argued that it appears unusual that groups of employees who were the most exploited and had the lowest socio-economic status were less likely to take a personal grievance against their employer, this is not necessarily the case as over seventy percent of personal grievance claims were resolved at mediation, making it unnecessary for them to be formally adjudicated.[41] It is possible to conclude that highly paid professional employees were much more likely to take a personal grievance as they would have been more inclined to be aware of their rights and to fight to maintain their professional positions, or alternatively if this was not possible to obtain a higher rate of compensation than what may have been possible to achieve at mediation. As higher paid employees were more likely to be aware of their rights and what the possibilities were they may have been more likely to fight on as a matter of principle and to have the

[41] See Chapter 2.4.

financial resources to do so. In contrast to the approach of high socio-economic status grievants, clerical and blue collar workers may have been less likely to take a case as far as adjudication due to the cost, necessity to find alternative employment quickly, delay and accessible representation.

Table 5.9: Combined Occupational Classes and Gender of Applicants Compared with Census[42]

Combined NZ Census Occupational Classes		**Female**	**Male**
Professional, Administration, Assoc professional	**Census**	34%	34%
	1997 data	33%	36%
Clerical, Sales and Service workers	**Census**	44%	13%
	1997 data	57%	22%
Farm and Trades workers, Operators and labourers	**Census**	22%	52%
	1997 data	10%	43%
Total		122	247

1997 Data, Total Females = 122, Total males =247[43]

Table 5.9 represents the census classifications of occupational class by gender from this study in comparison with the 1996 census figures. By combining similar occupational groups according to the categories in the census which show the greatest differentiation in terms of gender distribution, this further helps to provide a more tangible distinction between the genders of employees taking personal grievances[44] in specified occupational groups. The combination of occupational classes was due to the very small number of employees who took personal grievances as far as adjudication in 1997. The table shows the percentage of males and females who took personal grievances in the combined

[42] As only a very small percentage of all employees who took personal grievances represented both genders in one personal grievance, it was decided that this figure was too small to be representative, so has not been included in the calculation of percentages.
[43] In the remaining 26 cases, gender of applicants was not specified in the case data.
[44] See Table 5.7 for a detailed breakdown of employees who took particular types of personal grievance.

occupational groups of Professional, Administration and Associate professional was very similar and this applied to both the census and the study data. For clerical and sales and service workers the differences by gender were greater in the study than in the census figures. The highest number of female employees who took personal grievances occupied the Clerical and Service and Sales occupational class. The opposite pattern held for the blue collar occupations.

5.4.4 REPRESENTATION

The type of representation utilised by parties to a personal grievance was an important issue to consider in this analysis because it may have altered the final outcome of personal grievance claims, in terms of success, satisfaction and cost.[45] Different types of representation may have had an impact on various aspects of the personal grievance procedure and on the experiences of parties going through the adjudication process.[46]

Table 5.10 (below) shows the type of representation chosen by applicants and respondents. Advocates are representatives who were not listed in the Legal Services Directory for 1997, which meant that they did not hold a legal practice certificate although they may have had legal qualifications.[47] Advocates may also have been union officials or human resource practitioners but this information was not often contained in the Employment Tribunal decisions. Counsel were barristers and solicitors listed as

[45] For a discussion on these aspects, and parties' experiences of representation see Chapter 7.4.3.
[46] For further discussion on party representation and choice of representatives see Chapter 7.4.1.
[47] *Legal Services Directory 1997*. The Legal Services Directory was a compendium of all barristers and solicitors who held a practicing certificate for that year. It also identified their place of work for that year. There was no such similar directory for advocates who were not required to be legally qualified although many did have legal qualifications but did not practise as barristers or solicitors.

holding practicing certificates in the Legal Services Directory for that year.[48] Self-representatives were either applicants or respondents who chose to represent themselves.

Not included in Table 5.10 are the 35 employers who chose not to appear in personal grievance proceedings and who therefore did not have any representation. Why employers chose not to appear is a matter of conjecture: they may have considered that the employee's case carried no weight and they therefore chose not to bother appearing or paying a representative to present their case. This could not be addressed in Chapter Seven because of the low response rate to the survey by employers. Equally, employers may have decided not to defend a futile case. Indeed, the results show that if an employer chose not to appear, they had significantly less likelihood of success.[49] This may have been simply due to their arguments not being heard or assessed, or could have been a result of adjudicators taking a negative view of employers who chose not to appear at the hearing.[50] Again, another plausible explanation is that an employer who regarded their case as being weak found little point in appearing before the Tribunal.

Table 5.10: Party Representation

	Advocate	**Counsel**	**Self-rep**	**Other**[51]	**Total**
Applicant	169 (42%)	219 (54%)	13 (3%)	4 (1%)	405 (100%)
Respondent	104 (28%)	245 (66%)	22 (6%)	1 (0%)	372 (100%)

[48] Ibid. This can be compared with previous research which presented a large unknown category in relation to representation. For example, I McAndrew, 'Adjudication in the Employment Tribunal: Some facts and Figures on Caseload and Representation' (1999) 24 *NZJIR* 365.
[49] See Tables 5.19 and 5.20.
[50] For contrast, see Chapter 6.6.7 for adjudicators' views on reappearing parties.
[51] 'Other' includes Advocate/Counsel and Self-represented/Advocate, which meant that the party either used two types of representative, or may have changed representatives. 'Other' also includes 'No Appearance Required'.

Table 5.10 shows that both applicants and respondents chose to be represented by counsel more frequently than by advocates or by representing themselves. Generally, this would have been a more expensive option than being represented by a union as union membership fees typically provided for representation.[52] In surveys of employees who took personal grievances in 1997, the most common method of choosing a representative by non union employees was by having a personal contact, followed by selecting representation from the phone-book or by using their usual lawyer.[53] Adjudicators had mixed views regarding the standard of representation between the different representation groups. However, the interviews with adjudicators made it clear that they did not all believe that legal counsel were the best representation group.[54]

It is not clear from this database how many counsel or advocates were union employees. This was simply because the decisions of the Tribunal, whilst identifying the names of representatives, did not always indicate whether they were counsel or advocate, nor did it specify whether representatives were union employees or where their place of work was.[55] The Legal Services Directory did, however, identify barristers and solicitors but did not identify advocates or where their place of employment was.

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[52] Telephone discussion with Ross Wilson, President of the New Zealand Council of Trade Unions, 30 May 2005. He advised that State Unions such as the PPTA and NZEI had in their constitutions the requirement to provide legal representation for their members. However, Private Sector Unions provided representation on the merits of each case.

[53] For a discussion on these survey answers see Chapter 7.4.1, Tables 7.1 and 7.2.

[54] For further discussion on adjudicators' views on representation, see Chapter 6.7.

[55] See above n 3 and corresponding text. It should be noted that the results of survey questions in Chapter 7.4.1 show that of those surveyed, 25 percent of employees were represented by unions. In comparison, the level of trade union membership at the time was 33 percent of the workforce as outlined in S*urvey of Labour Market Adjustment Under the Employment Contracts Act* (August 1997) Department of Labour.

Table 5.10 shows that there were a high number of parties opting for representation. The fact that many participants opted for legal counsel could be considered quite surprising as many complaints about the provisions, particularly from parties to personal grievances, related to the legalistic nature of the process itself.[56] Equally, applicants may have believed that the nature of the process itself required appropriate legal representation. Indeed, the requirements for lodging personal grievances in the *Employment Contracts Act 1991* and Regulations were fairly strict and legalistic.[57] The legal requirements and the formal adjudication procedure itself meant that for many parties it was to their advantage to obtain legal representation or the services of a union, which may have had the resources to obtain representation by counsel or to represent its members. A further view could be that as union membership decreased as a result of the *Employment Contracts Act 1991,* it was likely that fewer applicants would be represented by union representatives.[58]

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[56] See Chapter 7.5 for discussion on descriptions of the adjudication process.

[57] See Chapter 2.4.1 for comment on this. See also *Employment Contracts Act 1991* Part III and First Schedule and *Employment Tribunal Regulations 1991*.

[58] W R C Gardiner, *The Employment Tribunal (A Report from The Trenches)* 13 May 1998, 5. It should also be noted that Department of Labour survey showed in 1997 that under the *Employment Contracts Act*, 33 percent of employees were Union members (Department of Labour, Industrial Relations Service, *Survey of Labour Market Adjustment Under the Employment Contracts Act* (August 1997) 18–19. See also R Harbridge and K Hince, 'The Employment Contracts Act: An Interim Assessment' (1994) 19 NZJIR 235. Although these figures show a decline in membership and the EC environment may have entailed a reduction in the number of cases that unions were involved in, the figures from the applicant surveys still shows that unions topped the list as providers of representative services at 29 percent of the providers. This is a marked reduction from what would have been the case in the *Labour Relations Act* so it would be in line with Gardener's survey above.

5.4.5 ADJUDICATORS

In the Auckland Employment Tribunal Registry, there were a significantly higher number of personal grievances.[59] This gave rise to the question; did the caseload of adjudicators vary between centres, and if so, did this affect the adjudication process?

Table 5.11: Number of Adjudicators in each Jurisdiction

Jurisdiction	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Total
Number of Adjudicators	14 34%	11 27%	10 24%	4 10%	2 5%	41 100%
Proportion of the working population	43%	14%	17%	19%	7%	100%

Table 5.11 shows that the Auckland Tribunal Registry had the most adjudicators although not as many as would be expected given its high proportion of the working population.[60] The Christchurch and Dunedin offices covered a larger geographical area, being the whole of the South Island except Nelson, but had only six adjudicators.[61] All Tribunal Registries covered a large geographical area; it is likely that size of geographical area did not determine the number of adjudicators employed.[62] It is also clear that population did not affect the number of adjudicators employed in a particular registry as Christchurch had the second largest population and the second lowest number of adjudicators.[63] As noted by Ralph Gardiner, the number of adjudicators in each area was intended to

[59] See Table 5.1 above.
[60] *Employment Tribunal Regulations 1991*, reg 2(1) and sch 1 established the areas served by Offices of the Tribunal. As noted above, the Employment Tribunal operated from 3 offices: Auckland, Wellington, and Christchurch. Each area was defined in the First Schedule in terms of territorial authority districts.
[61] W R C Gardiner, *The Employment Tribunal (A Report from The Trenches)* 13 May 1998, 4.
[62] Ibid.
[63] See Table 5.1 for details of working population.

represent the percentage of the workload distributed in each registry. Fifty percent of the workload for the Employment Tribunal was heard in the Auckland Tribunal Registry, 28 percent in the Wellington Registry and 22 percent in the Christchurch/Dunedin Registry.[64] Intuitively, it follows that individual adjudicators should have carried an equivalent caseload in each jurisdiction. The reality of this is shown in Table 5.12 below (note that some adjudicators sat in more than one place):

Table 5.12: Average Annual Caseload of Adjudicators for the Year 1997

Jurisdiction	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Average of all Registries
Average number of cases	12	3	7	28	7	11
Number of Adjudicators Sitting	14	11	10	4	2	8

Significance: .529, Eta: .099

Table 5.12 shows the average number of personal grievances that adjudicators heard within each centre in 1997. As can be seen from this table, the average caseload was varied; this difference reflected the number of adjudicators in each jurisdiction. Thus, while Ralph Gardiner noted that 50 percent of the workload of the Employment Tribunal was distributed in the Auckland Registry, this was distributed between a proportionately larger number of adjudicators than in Christchurch.[65]

When adjudicators were asked what their view of their comparative caseload was, their responses did not wholly reflect the findings in Table 5.12. For example, five out of the nine Auckland adjudicators believed that they had a high caseload in comparison to other

[64] Ibid.
[65] As shown in Table 5.11.

adjudicators.[66] However, as Table 5.12 shows the average caseload of adjudicators, it therefore does not reflect any particular individual adjudicator's caseload. Further, this table does not take into account other factors that contribute to caseload such as the length or complexity of hearings; a point returned to below. In contrast to the Auckland adjudicators, no adjudicators in either Wellington or Dunedin believed that their caseload was high compared to other adjudicators.[67] This reinforces the data in Table 5.12, which shows that Wellington and Dunedin adjudicators had a lower average caseload than adjudicators in Auckland and Christchurch. All adjudicators in Christchurch reflected reality in expressing their belief that they had heavy workloads.

It may have been that more cases were resolved at mediation in the jurisdictional areas with lower caseloads.[68] The *Employment Contracts Act 1991* provided for the appointment of Members of the Employment Tribunal who were adjudicators, mediators, or both.[69] All Members interviewed from 1997 held dual warrants to adjudicate and mediate.[70] From 30 June 1996 to the 30 June 1997, 5,424 applications to the Employment Tribunal were received, 3,202 mediations were scheduled and 400 adjudications were serviced.[71] From 30 June 1997 to 30 June 1998, 5,332 applications to the Employment Tribunal were received, 3,107 mediations were scheduled and 492 adjudications were

[66] See Chapter 6.4.9, Table 6.4 and accompanying text.
[67] Ibid.
[68] From the year ending 30 June 1997, 5,424 applications to the Employment Tribunal were made, and of those, 3,202 mediations were scheduled. From the year ending 30 June 1998, 5,332 applications were made and 3,107 mediations were scheduled. New Zealand Department of Labour, Annual Reports.
[69] *Employment Contracts Act*, s 81 (b), (c) and (d).
[70] Personal Correspondence with Chief of the Employment Tribunal, Alistair Dumbleton, 16 July 1998.
[71] Labour Department, Annual Report ending 30 June 1997, 36.

serviced.[72] It is not clear from these figures how many of those applications related to personal grievance claims and how many were disputes or other forms of action. The figures do make it clear, however, that there were many more mediations scheduled than adjudications, which may have contributed to adjudicators' perceptions that they had a high caseload.

One Wellington adjudicator stated that in Wellington they did equally as many mediations as adjudication hearings. In comparison, a number of Auckland adjudicators indicated that they had agreed to have three days set down for adjudication hearings a week, and then they would have a week of mediation, dealing with two cases a day for five days a week. In Christchurch the situation was different again, with one full-time mediator and no set formula for distributing the caseload or hearing adjudications. Adjudicators in Christchurch therefore advised the administration staff what they wanted to do each week depending on their workload. The fact that Christchurch had one full-time mediator may have contributed to other members having a higher adjudication caseload, as mediated cases were not included in the database. A number of adjudicators from different centres said that they would swap adjudication and mediation between members depending on what work they preferred to do. Consequently some members had a higher adjudication workload and some had a higher mediation workload.

Table 5.12 shows that Christchurch had a significantly higher average caseload than any other jurisdiction. This may have been because fewer cases were resolved at mediation,

[72] Ibid.

or because parties refused to attend mediation. It could also have been that adjudicators in Christchurch were deciding cases more promptly, consequently hearing more personal grievances, which in this table translates into a higher caseload. An alternative possibility was simply that Christchurch was significantly short of Tribunal Members, given that it had the second largest population base of all New Zealand cities.

Although Christchurch adjudicators had a higher caseload than those in Auckland, this could not be attributed to the length of hearings, as in both centres the average length of hearing was 1.48 days.[73] If the hearings were of longer duration in Auckland, this would have explained the disparity between the average caseloads of adjudicators in Auckland and Christchurch, as it would not have been possible for adjudicators to decide as many cases. However, although there was no distinction in the length of hearing between Auckland and Christchurch, there was a significant difference between the two centres in the delay between the date of hearing and the date of decision.[74] The average delay between hearing and date of decision in Auckland was 73.12 days, while in Christchurch the delay was 39.39 days.[75] This was despite one Auckland adjudicator stating:

> I give more decisions orally on the day of the hearing than any other Tribunal Member. I've done that in nearly 50 percent of all cases I've heard since starting in the Tribunal.[76]

The difference in delay between the date of hearing and date of decision explains the difference in average caseload between Christchurch and Auckland, with decisions in

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[73] See Table 5.38 regarding average length of hearings in each centre.
[74] See Table 5.40 regarding the length of delay between the date of hearing and date of decision in each of the centres.
[75] Ibid.
[76] See Chapter 6.4.9.

Auckland taking longer to be issued. Thus, not only were adjudicators deciding fewer cases annually per adjudicator in Auckland than they were in Christchurch, they were also taking a longer time to issue those decisions. It follows that adjudicators in Christchurch were working more efficiently, issuing their decisions more quickly, and enabling a larger number of cases to be heard and decided.

In Dunedin there were only 13 personal grievances, as shown in Table 5.1, and only two adjudicators as shown in Table 5.11 above. Thus, the workload per adjudicator was 6.5 adjudicated hearings in 1997. Likewise, in Hamilton, although there were more personal grievances (34),[77] the caseload was divided between 11 adjudicators,[78] consequently reducing the average caseload per adjudicator, explaining why Hamilton adjudicators had an average caseload of only 3. In Wellington there were 81 personal grievances adjudicated in 1997 and 10 adjudicators,[79] with the average caseload being 7.4 per adjudicator which accords with the workload being split fairly evenly between the 10 adjudicators. As Wellington also adopted a case-management approach, this may explain why the average caseload for adjudicators in Wellington was lower than in the Christchurch and Auckland jurisdictions.[80]

[77] See Table 5.1 above.
[78] See Table 5.11 above.
[79] See Tables 5.1 and 5.11 above.
[80] The case-management approach involved adjudicators discussing basic elements of the case with the parties and their representatives prior to formal adjudication to iron out any possible procedural issues. For Wellington adjudicators' comments on the case-management approach, see Ch 6.4.9.

5.4.6 RESULTS OF PERSONAL GRIEVANCES

This research examined whether or not the personal grievance system worked for all participants, by investigating the outcomes from all personal grievances adjudicated in 1997. Success could have been measured subjectively using the opinions of participants in surveys.[81] Or in contrast, the data obtained from the database is objective information about what actually occurred in adjudication. This chapter measures the success of personal grievances from the objective data obtained from the decisions in 1997.

It was decided to measure the success or otherwise of the personal grievance in three categories: wholly successful; partly successful; and unsuccessful. The wholly successful category meant that the applicant received everything they had claimed. This included cases where amounts claimed were not specified but remedies were granted. Partly successful meant that the applicant had succeeded in being awarded part of what they had claimed. Thus, a party could have had some success without wholly winning the case.[82] For example, partly successful included the few cases where there was a personal grievance established but contributory fault amounted to 100 percent and no remedies were awarded.[83] Thirdly, unsuccessful meant that the applicant had no personal grievance

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[81] See Chapter 7.5.8.

[82] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Dismissal for Misconduct' (2000) 25 NZJIR 303, 307. McAndrew's analysis did not distinguish between success and part success, it categorised success as win or lose. McAndrew acknowledged that 'winning' was a question of degree as it may have been held that a grievance existed but remedies awarded may have been reduced due to contributory fault. McAndrew therefore defined a 'win' as consisting of a decision by the Employment Tribunal that the employee had a personal grievance, and not as a result of the remedies awarded. In contrast, my analysis measured the success of the grievance, or 'winning', as the finding that there was a grievance *as well as* remedies and costs awarded. For a discussion of contributory fault and reduction of remedies see below, 5.4.7(d).

[83] See AT 208/97 and AT 333/97.

established *and* was awarded no remedies. It should be noted that on occasion it was very difficult to determine from the decisions whether a case had been wholly successful or partly successful, as the amounts claimed or awarded were not clearly specified in the decision.[84]

Table 5.13: Applicants' Success Rate

	Wholly Successful	Partially Successful	Unsuccessful	Total
Auckland	12	81	74	167
	7%	49%	44%	100%
Hamilton	3	15	16	34
	9%	44%	47%	100%
Wellington	4	45	30	79
	5%	57%	38%	100%
Christchurch	11	57	44	112
	10%	50%	39%	100%
Dunedin	1	7	4	12
	8%	58%	33%	100%
Total	31	205	168	
	8%	50%	41%	404

Significance: .857, Somer's D: .005

Table 5.13 shows that nationally applicants had a 58 percent success rate. That is, there was some positive outcome from taking a personal grievance.[85] On the other hand, 41 percent of applicants were unsuccessful in their claims of personal grievance. In Wellington, the partial success rate was seven percent higher than the national average, but Wellington also had the lowest rate of total success. It is worth noting however, that the figures nationally were consistent with less than one in ten applicants receiving what

[84] See above n 3.

[85] This finding is similar to other previous research. For example W R C Gardiner, *The Employment Tribunal (A Report from The Trenches)* 13 May 1998, 11-12, listed success rates for 1994 and 1995 as 63 percent and 62 percent respectively. Ian McAndrew, above n 69, 308, found that the overall success rate from 1992 until 1999 was 61.5 percent.

they had claimed. This may have been due to applicants' unrealistic expectations or unrealistic claims as a result of advice received by representatives. This is discussed in relation to remedies below at 5.4.7.

Table 5.14: Gender of Adjudicator as an Indicator of Applicant Success

Gender	Wholly Successful	Partially Successful	Unsuccessful	Total
Female	7 6%	54 49%	49 45%	110 100%
Male	24 8%	151 51%	119 40%	294 100%
Total	31 7%	205 50%	168 42%	404 100%

Significance: .702, Somer's D: .001

Table 5.14 shows that there were insignificant differences between the rates of whole success, partial success and unsuccessful outcomes depending on the gender of the adjudicator. There were no female adjudicators in either Christchurch or Dunedin, one female adjudicator in Wellington and the rest located in Auckland. As seen in Table 4.13, unsuccessful rates were lower in Wellington, Christchurch and Dunedin, where there were fewer or no female adjudicators but the relationship between gender and outcome may not be influencing this figure.

Gender and success were linked by McAndrew, Dowling and Woodward when considering applicants dismissed for performance reasons. They found that regardless of the gender of the applicant, male adjudicators were more likely to have found for the applicant than female adjudicators, although the differences were not substantial.[86]

[86] Ian McAndrew, Dermott, J Dowling and Sean Woodward, 'Gender Patterns in the New Zealand Employment Tribunal: Some Notes on Theory and Research' (1997) 22 NZJIR, 277, 298. McAndrew, Dowling and Woodward qualified their findings by saying that their findings relied on a number of

Further research by McAndrew and Beck confirmed this, establishing that personal grievant success rates under male adjudicators were 60 percent and under female adjudicators it was 51 percent.[87]

Table 5.15: Gender of Applicant and Applicant Success

	Wholly Successful	**Partially Successful**	**Unsuccessful**	**Total**
Female	18 14%	67 50%	47 35%	132 33%
Male	13 5%	130 50%	115 44%	258 64%
Both male and female	–	8 57%	6 42%	14 3%
Total	8% 31	51% 205	42% 168	100% 404

Significance: .369, Somer's D: .007

Table 5.15 shows that there was very little distinction between partial success rates of females and males. However, there was a higher rate of whole success where the applicant was a female. Research by McAndrew and Beck found that female applicants had a 60 percent rate of success as opposed to male applicants who had a 56 percent rate of success. However, as discussed above, the definition of "success" was different in McAndrew and Beck's research.[88] Although female applicants sought and were granted less compensation than males, what they received in compensation was proportionately higher than that received by male applicants.[89]

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untested assumptions including: the cases in the sample all had equal merit; an equal likelihood to mediate rather than adjudicate; representation type; reason for dismissal and so on.

[87] These results were taken from cases adjudicated in the last 18 months of the operation of the Employment Tribunal to 30 September 2000. Kathryn Beck and Ian McAndrew, 'Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority', (2002) New Zealand Law Society Employment Law Conference, 211, 217. It should be noted that McAndrew and Beck's definition of 'success' was different to that used in this research – see above n 81.

[88] Ibid 217. See above n 70.

[89] See Table 5.27 below.

Another issue that may have affected the outcome of adjudication was the career background of the adjudicator. Table 5.15 shows the career background of adjudicators and whether specific backgrounds had any particular effect on the success or otherwise of personal grievances which they decided.

Table 5.16: Background of Adjudicators as an Indicator of Applicant Success

Degree of success	Whole Success	Partial Success	Unsuccessful	Total Cases
Academic and Employer[90]	0 %	71%	29%	7
Academic and Union[91]	8%	46%	46%	13
Private Practice[92]	9%	43%	49%	70
Public Sector[93]	9%	52%	39%	106
Public Sector and Employer[94]	9%	49%	42%	43
Public Sector and Union[95]	5%	51%	44%	39
Private Sector[96]	5%	56%	39%	39
Private and Public Sectors[97]	0%	58%	42%	19
Union[98]	12%	53%	35%	34
Union, Private and Public [99]	8%	54%	39%	26
Union and Private Sector[100]	0%	38%	63%	8
Total	6% 31	52% 205	43% 168	100% 404

Significance: .479, Somer's D: 0.12

[90] 'Academic and Employer' meant that the person had worked for a tertiary institution as well as an employer's organisation.
[91] 'Academic and Union' meant that the person had worked for a tertiary institution as well as an employee's organisation.
[92] 'Private Practice' meant that the person had worked in private legal practice.
[93] 'Public Sector' meant that the person had worked in a public service, crown entity or state agency.
[94] 'Public Sector and Employer' meant that the person had worked for public service, crown entity or state agency as well as an Employer's organisation.
[95] 'Public Sector and Union' meant that the person had worked for a public service, crown entity or state agency, and an employee's organisation.
[96] 'Private Sector' meant that the person had worked in a private sector company or organisation.
[97] 'Private Sector and Public Sector' meant that the person had worked for a private sector company or organisation as well as a public service, crown entity or state agency.
[98] 'Union' meant that the person had worked for an employee's organisation.
[99] 'Union, Private and Public Sectors' meant that the person had worked for an employee's organisation, a private sector company or organisation, and a public service, crown entity or state agency.
[100] 'Union and Private Sector' meant that the person had worked for an employee's union as well as a private sector company or organisation.

Two results immediately stand out from Table 5.16: adjudicators with an Academic and Employer background had a higher rate of granting some success than all other adjudicators at the other end of the scale, adjudicators with a Union and Private Sector background gave more decisions that were unsuccessful for the applicant than all other adjudicators. However, adjudicators with these two backgrounds represented a small proportion of the total number of cases decided (seven and eight respectively). It is therefore unclear how much weight to give these results.

Excluding these results shows a general consistency of success rates for applicants. Table 5.16 shows fluctuations between the adjudicators with a Private Practice background, with an approximately 49 percent rate of unsuccessful claims and those adjudicators with a Union background with a lower level of unsuccessful claims at approximately 35 percent. Also, Table 5.16 shows that if adjudicators came from a purely Union background, there was a slightly higher likelihood that an applicant would have been wholly successful. Again, it is difficult to draw any clear conclusions from the table as to whether the adjudicators' background affected applicant success, as the results are generally similar and do not appear to confirm that prior employment background is a significant factor.

Table 5.17: Cause of Action and Applicant Success

Cause of Action	Wholly Successful	Partially Successful	Unsuccessful	Total
Unjustifiable Dismissal	22 7%	160 54%	114 39%	296 100%
Unjustifiable Constructive Dismissal	2 6%	14 46%	17 49%	33 100%
Unjustifiable Action	1 5%	12 52%	8 43%	21 100%
Other	6 11%	19 37%	29 52%	54 100%
Total	31 7%	205 46%	168 46%	404 100%

Significance: .143, Somer's D: .015

Table 5.17 shows that the lowest success rate was in the category of 'other'. This could be for several reasons: 'other' includes a multitude of different types of personal grievances, which were decided as separate applications by the Employment Tribunal, and were therefore counted separately. This included out of time applications, costs decisions, strike out proceedings, parental leave complaints, procedural fairness, as well as personal grievances which were a combination of causes of action such as unjustifiable dismissal procedural fairness, and unjustified action unjustifiable dismissal. Table 5.17 shows that unjustifiable dismissal cases had the highest rate of success. This is consistent with research conducted by Tony Couch in 1998.[101]

[101] T Couch, 'Statistics and Comment' in *New Zealand Law Society Employment Law Conference 1998* 119, 122.

Table 5.18: Occupational Class and Success rate of Applicant

Occupational Classes (combined)	Successful	Partially Successful	Unsuccessful	Total
Professional, Administration and associate professional	7%	48%	45%	100%
	7	51	48	106
Clerical service and sales workers	8%	54%	39%	100%
	11	76	55	142
Farm and trades workers	7%	38%	55%	100%
	4	21	31	56
Operators and labourers	4%	65%	32%	100%
	3	51	25	79
Total	7%	52%	42%	100%
	25	199	159	383[102]

Significance: .186, Somer's D: -.070

Table 5.18 illustrates the lower level of success achieved by farm and trades workers, followed by white collar workers such as professionals and managers. Lower status workers, clerical, sales and service and operators/general labourers were more successful. Further analysis shows if the employee worked in the public, health or educational categories, there was a lower rate of applicant success compared to employees in other occupational classes. This differs to McAndrew's research, which notes that between 1992 and 1997 over 70 percent of personal grievances taken by managers were successful.[103] McAndrew speculated that the reasons for the higher rate of success for managers may have been due to them obtaining more effective representation, having better claims, or being less willing to settle at mediation if they had meritorious claims.[104]

[102] For the cases not included in this table, the data was unspecified as to applicant success.
[103] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figure on Caseload and Representation' (1999) 24 *NZJIR* 365, 372–3.
[104] Ibid 373.

Other possibilities why managers were more successful could have included that managers had a better working knowledge of the system; there were higher stakes at issue with respect to levels of remedies claimed; and they may have been more articulate and thus able to present their case more effectively. When managers were separated from professionals in the 1997 cases it was inconclusive as to why managers enjoyed a higher rate of success. Generally, managers appeared to go against trends in the data. For example, managers were generally represented by counsel (26 out of 37 managers were represented by counsel), yet were more successful than the figures in Table 5.20, which shows that advocates were generally more successful than counsel. Similarly, Table 5.15 above shows that female applicants were very little more successful than males; however, 30 out of 37 of management positions in this analysis were male.

Table 5.19: Applicant Representation and Applicant Success

	Wholly Successful	**Partially Successful**	**Unsuccessful**	**Total**
Advocate	14 8%	95 57%	58 35%	167
Counsel	15 7%	101 46%	102 47%	218
Self-represented	2 15%	8 62%	3 23%	13
Total	31 8%	204 51%	163 41%	398

Significance: .944, Somer's D: .014

Table 5.20: Respondent Representation and Applicant Success

	Wholly Successful	Partially Successful	Unsuccessful	Total
Advocate	8 8%	53 53%	40 40%	104
Counsel	17 7%	104 42%	124 51%	245
Self-represented	1 5%	18 82%	3 14%	22
No Appearance by respondent	5 14%	30 86%	0 0%	35
Total	31 8%	205 51%	168 41%	403

Approx sig.: .184, Value: .080

Tables 5.19 and 5.20 look at applicant success rates and show that self-represented applicants were more likely to be partially successful and wholly successful than those represented by advocates or counsel. In contrast, McAndrew found that self-represented applicants had only a 49 percent rate of success.[105] However, in determining the outcome of a personal grievance McAndrew considered 'success' in terms of 'winning' or 'losing'.[106] As discussed above, success in my analysis was measured as remedies sought and granted by the Employment Tribunal. It is possible that self-representatives had a higher rate of success as personal grievances taken by advocates and counsel may have been more complex in nature. As with the manager success rate, there is little correlation in this analysis between self-representation and other factors that might have affected the rate of success.

[105] Ibid 374–5. McAndrew used a larger sample of cases, from 1992-97. Further research by McAndrew and Beck found that self-represented applicants had only a 40 percent rate of success in comparison to represented applicants who had a 59 percent rate of success. See above n 81.

[106] See above n 81. Also note that McAndrew's classification of 'success' did not include where a personal grievance was found but no remedies were awarded.

In the 35 cases where the respondent did not appear, the applicant had a partly successful or wholly successful outcome in every case. This may have been because the respondent had made no formal response to the personal grievance and therefore the Employment Tribunal had no basis on which to assume the respondent's case. Section 100 of the *Employment Contracts Act* provided that in the event that a party did not appear at adjudication, the Employment Tribunal could proceed as if that party had appeared.[107] This meant that the Employment Tribunal could still hear and decide the personal grievance as if the absent party had attended but they would only be deciding on the evidence presented by one side.

If either party was represented by an advocate, the applicant had a better partial success and whole success rate than if represented by counsel. This could have been because advocates worked full time in the employment area and counsel may have had limited or little experience in the employment jurisdiction. Prior to the *Employment Contracts Act 1991*, counsel were less likely to be involved in employment matters as under the *Labour Relations Act 1987* unions and employer organisations represented parties to personal grievances.[108] It is not possible to make a direct comparison between the number of counsel operating under the *Labour Relations Act 1987* and the *Employment Contracts Act 1991* because under the *Labour Relations Act*, proceedings before a Grievance Committee or the Court were absolutely privileged and the information is not

[107] *Employment Contracts Act 1991*, s 100 states: 'if, without good cause shown, any party to adjudication proceedings before the Tribunal fails to attend or be represented, the Tribunal may act as fully in the matter before it as if that party had duly attended or been represented.'
[108] *Labour Relations Act 1987*, sch 7.

available.[109] However, there was increased legal interest in employment law after the enactment of the *Employment Contracts Act 2000*, which is evidenced by the establishment of the Employment Law Institute,[110] more frequent employment law conferences,[111] and the availability of legal aid for adjudication hearings.[112] Additionally, the *Employment Contracts Act* made personal grievances available to non-union members for the first time, who would in general have chosen to be represented by counsel or advocates.[113]

In contrast, McAndrew found that if applicants were represented by counsel, the rate of success was higher than if they had been represented by advocates.[114] However, as stated above, McAndrew's different measure of success should be taken into account, as well as that his surveys were conducted over a longer timeframe. McAndrew also noted that the difference in outcomes between representation by advocates and that by counsel was not significant.[115]

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[109] *Labour Relations Act 1987*, s 224.
[110] Employment Law Institute was established in 1997 by employment law specialists as a result of the increasing demand for legal representation in employment cases (telephone discussion with Secretary of the Employment Law Institute, 7 July 2005).
[111] Telephone discussion with James Branthwaite, Canterbury District Law Society Librarian, 28 June 2005, where it was advised that in the few years preceding 1991, there were only 6 employment law conferences while in the years between 1991 and 2000, there were at least 40 employment law conferences.
[112] *Legal Services Act 1991*, s 19. See discussion on legal aid at 5.4.8(a) below.
[113] *Employment Contracts Act 1991*, s 21(1).
[114] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figure on Caseload and Representation' (1999) 24 *NZJIR* 365, 374–5.
[115] Ibid 375.

5.4.7 REMEDIES

All 1997 personal grievance decisions were examined to determine the type and amount of remedies sought by the applicant and granted by the Employment Tribunal.[116] The most common remedies sought were recovery of wages lost (RWL) under s 41(1), which was compensation for lost remuneration as a result of the personal grievance, and compensation under s 40(1)(c)(i) for humiliation, loss of dignity and injury to feelings.[117] It was therefore most useful to focus on these awards as a measure of the success of the outcome of cases.[118] This was also a useful mechanism to measure the expectation and therefore the proposed outcome for applicants. Loss of benefits, arrears of wages, redundancy pay, recovery of wages, holiday pay, penalty for breach of contract and penalties in general were not considered in this analysis. This was because they comprised such a small proportion of remedies sought and granted and it was often difficult to determine the amounts sought under these headings as they were not always specified in the Employment Tribunal decisions. Further, remedies such as arrears of wages, redundancy pay, and holiday pay were not specific remedies for personal grievances.

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[116] Recovery of Wages Lost (RWL) was the reimbursement to the employee of the sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Compensation (Comp) was for humiliation, loss of dignity, and injury to the feelings of the employee. Costs (C) was for the reasonable costs incurred by either party. See *Employment Contracts Act 1991*, ss 40 and 108. It should be noted that these were not the only remedies available under the *Employment Contracts Act* but were the most prevalent remedies sought.

[117] For a definition and discussion of recovery of wages lost, see ch 2.4.4(a); reimbursement.

[118] Cf reinstatement was sought in only 16 cases, granted only in five cases. See Table 5.31 below and accompanying text.

5.4.7(A) RECOVERY OF WAGES LOST

It was not always possible to record specific remedies amounts claimed and awarded as these amounts were not always specified in the decision.[119] However, it was sometimes possible to work out the amount of recovery of wages lost sought if the relevant time period was specified and the rate of pay was given. The figures below illustrate the legitimacy of criticisms of the amounts claimed and awarded.[120] Thus, employers perceived that remedies awarded were overly generous while those same awards rarely matched employee expectations.

Table 5.21: Average Recovery of Wages Lost by Jurisdiction

	Auckland	**Hamilton**	**Wellington**	**Christchurch**	**Dunedin**	**National Average**
Recovery of Wages Lost Sought	$20,412.19 87	$21,052.05 17	$18,934.12 33	$15,005.25 44	$8,358.91 5	$18,605.36 186
Recovery of Wages Lost Granted	$4,635.25 95	$5,551.09 16	$4,018.81 36	$1,986.65 49	$3,193.00 5	$3,916.19 201

RWL Sought Significance: .889, Eta: .079 RWL Granted Significance: .266, Eta: .162

In all jurisdictions, it can be seen that there was a substantial difference between Recovery of Wages Lost sought and granted. This could lend weight to the perception that employees may have been making claims for Recovery of Wages Lost that were outside of the scope of the Employment Tribunal under section 41(1) of the *Employment Contracts Act 1991*. The disparity between Recovery of Wages Lost sought and granted

[119] See above n 3 and accompanying text.
[120] P Stapp, 'The Employment Tribunal in 1998' in *New Zealand Law Society Employment Law Conference 1998* 137, 146. See also the dissenting judgment of Thomas J in *Aoraki Corporation v McGavin* [1998] 3 NZLR 276 (CA).

may have been due to some applicants making claims for a future period beyond what the Employment Tribunal would award. This was confirmed by adjudicators who stated that there was a clear formula in the legislation for the calculation of Recovery of Wages Lost.[121] However, there was potential overlap between claims for Recovery of Wages Lost, which was able to look into future earnings, and compensation, with some applicants attempting to claim either Recovery of Wages Lost under the compensation heading or compensation under the Recovery of Wages Lost heading. In Christchurch, the disparity between Recovery of Wages Lost sought and granted was the most marked. In Auckland and Hamilton, the actual amount claimed was higher than in other areas. On initial examination it was thought that this may have been because pay rates were higher in those northern geographical districts. However, data obtained from the 1996 Census shows that in reality both the median income and the number of people earning over $40,000 was higher in Wellington, as evidenced by Tables 5.22 and 5.23 below.[122]

Table 5.22: Median Personal Income by Geographical Area from 1996 Census Information

	Male	**Female**
Auckland Region	$24,401	$13,715
Waikato Region[123]	$21,620	$12,347
Wellington Region	$25,480	$14,359
Canterbury Region	$21,418	$12,022
Otago Region[124]	$19,216	$11,247

[121] *Employment Contracts Act 1991*, ss 40(1) (a) & 41(1) (b). Also see ch 6.4.12.
[122] See 1996 Census at: http://www.stats.govt.nz/domino/external/web/ExtraPages.nsf/htmldocs/Standard+Regional+Tables+Census+1996+-+Map. It should be noted that in the information gathered in the 1996 Census, 'personal income' included not only salary and wages, but investment income, superannuation, pensions and annuities, ACC, NZ Superannuation, benefits, other Government funded benefits, and student allowance.
[123] The Waikato region includes Hamilton.

Table 5.23: Percentage of People with a Personal Income over $40,000 by Geographical Area from the 1996 Census Data

Region	Percentage of People with a Personal Income over $40,000
Auckland Region	14.1%
Waikato Region	11.5%
Wellington Region	16.3%
Canterbury Region	9.8%
Otago Region	8.4%

Another possible reason for the disparity between Recovery of Wages Lost sought and granted may have been due to the contributory fault of the applicant resulting in a reduction of Recovery of Wages Lost awarded. However, reduction of Recovery of Wages Lost due to contributory fault was only applied in seven percent of the 407 cases in 1997. Consequently, it does not seem to be a major factor in the reduction of Recovery of Wages Lost granted.[125]

5.4.6(B) COMPENSATION

Table 5.24: Average Compensation for Humiliation, Loss of Dignity and Injury to Feelings

	Auckland	Hamilton	Wellington	Christchurch	Dunedin	National Average
Compensation Sought	$23,604	$22,190	$20,575	$20,460	$17,688	$21,892
N	101	21	43	62	8	235
Compensation Granted	$3,560	$3,381	$3,274	$2,831	$4,438	$3,339
N	116	26	48	64	8	262

Comp Sought Significance: .843, Eta: .078 Comp Granted Significance: .811, Eta: .078

[124] The Otago region includes Dunedin.
[125] For further discussion on contributory fault, see para 5.4.7 below.

Of all remedies available, compensation for humiliation, loss of dignity and injury to feelings was perhaps the most useful measure of the outcome of personal grievances.[126] The award of compensation was almost universally claimed by applicants and was arguably the remedy over which Employment Tribunal adjudicators had the most discretion.[127] Again there is a substantial disparity between amounts sought and granted.[128] This again reflects the notion that some applicants had unrealistic expectations of the level of remedies available. Gardiner stated, 'applicants [often] arrive at our hearings so pumped up with expectation that little short of a howitzer will reach them as they float about somewhere above cloud nine'.[129] Auckland applicants sought higher amounts of compensation than applicants in other centres, which is interesting given that information from the 1996 Census shows that the average level of personal income was higher in Wellington.[130] Adjudicators were divided over whether wage and salary levels should be taken into account when determining levels of compensation to be awarded.[131] One adjudicator stated that '[y]ou can have the same set of facts, get six different

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[126] Compensation under this head was awarded under the *Employment Contracts Act*, s 40(1)(c)(i). Compensation could also be awarded for the loss of any benefit: s 40(1)(c)(ii). In this research, 'compensation' refers to compensation for humiliation, loss of dignity and injury to feelings as defined by *Employment Contracts Act 1991*, s 40(1)(c)(i), unless otherwise stated.

[127] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 *NZJIR* 365, 370.

[128] See the dissenting judgment of Thomas J in *Aoraki Corporation Ltd v McGavin*, Court of Appeal, 15 May 1998, (CA2/97), where he states that 'while I would reduce the Employment Court's award of $50,000 for Mr McGavin's humiliation and distress, I would not reduce it to the sum of $15,000 as provided in the main judgment. To my mind, an amount in the order of $25,000 to $30,000 would be an appropriate award.'

[129] See Gardiner, above n 4, 12.

[130] See above Tables 5.22 and 5.23 and accompanying text.

[131] For a discussion on factors taken into account by adjudicators when awarding compensation, see ch 6. It should also be noted that compensation for lost benefits would also have been affected when considering wage or salary levels.

adjudicators, six different judges, you'd probably get six different answers'.[132] In *Trotter v Telecom Corp of NZ Ltd*, the assessment of quantum was described as not being a precise art, but a process of applying the principles in like cases to achieve consistency.[133] However, when asked what their attitude was to the direction of the Employment Court as to remedies, adjudicators' responses were varied. One adjudicator stated that 'I ignored them. They're so bloody inconsistent in that Court. For two or three years they'll be thumping one way of approach, then they completely back-track'.[134]

The greatest disparity between compensation sought and granted was in Christchurch, while the smallest disparity was in Dunedin. Dunedin also had the highest average compensation granted but it is possible that this was due to substantial awards being included in the Dunedin analysis, which skewed the figures. The analysis conducted was based on an average of compensation sought and granted. This can be compared to previous research, which showed that 60 percent of awards for compensation were less than $5000 and 95 percent were below $10,000.[135] However, such research does not highlight the gap between applicants' expectations and results. Table 4.25 below shows awards made by the Employment Court and Employment Tribunal during 1997:[136]

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[132] See 6.4.12(c).
[133] [1993] 2 ERNZ 659. See also ch 2.4.4(b).
[134] See ch 6.4.12.
[135] See McAndrew, above n 81, 309, who looked at compensation awards between 1992 and 1999; Gardiner, above n 5, 13, who looked at compensation awards in 1997; and Couch, above n 100, 125, who looked at compensation awards between 1991 and 1998.
[136] These figures are taken from Gardiner, above n 5, 12–13.

Table 5.25: Compensation Awards Ordered by the Employment Court and the Employment Tribunal as Collated by the Employment Institutions Information Centre

Amount of Award	Number of Awards	Cumulative percentage
$1-999	6	3%
$1,000 – 1,999	14	10%
$2,000 – 2,999	39	28%
$3,000 – 3,999	33	44%
$4,000 – 4,999	29	58%
$5,000 - 5,999	22	68%
$6,000 – 6,999	17	77%
$7,000 – 7,999	13	83%
$8,000 – 8,999	10	88%
$9,000 – 9,999	2	89%
$10,000 – 10,999	10	93%
$12,000	1	94%
$12,500	2	95%
$15,000	6	98%
$20,000	1	98%
$30,000	1	99%
$35,000	2	99%
$50,000	1	100%
Total	209	

The figures in Table 5.25 include awards for compensation made by the Employment Court as well as the Employment Tribunal, while Table 5.24 only includes awards in the

Employment Tribunal. As can be seen from Table 5.25, most compensation awards from the Employment Court and the Employment Tribunal were below $6,000. In comparison, the average award of compensation across all centres contained in Table 5.24 was between $2,800 and $4,500. As the information contained in Table 5.24 refers to average awards, in comparison to the actual number of awards of each amount in Table 5.25, the results are not directly comparable but clearly small awards make up the majority. Similarly, Lorraine Skiffington conducted research on compensation awarded under s 40(1)(c) of the *Employment Contracts Act 1991*, and found that:[137]

> [w]hile there was a range of amounts awarded depending on the individual merits of each claim, the Employment Tribunal awarded an average of $3878 in compensation . . . under s 40(1)(c) of the EC Act. The Employment Court awarded an average of $10,000. Combining these figures for the Employment Tribunal and the Employment Court, indicates an overall average level of compensation of approximately $6935 per grievant. Comparing findings of this research with those of B Boon . . . unjustifiably dismissed employees are arguably worse off in terms of the compensation they receive under the EC Act than they were under previous legislation.

It can also be seen from Table 5.24 that the national average amount of compensation sought was $21,892.40, and awards above $20,000 were very rare, with only 5 being awarded in 1997.

[137] Lorraine Skiffington, 'What is a Job Worth?' (1994) *Employment Law Bulletin*, 74. In a survey of Compensation awarded under the *Labour Relations Act 1987*, Bronwyn Boon found that the overall average payment of compensation in the 82 percent of successful cases which had compensation as a component was $8,134, while the overall average for workers who had not been reinstated was $7,149.

Table 5.26: Average Compensation by Occupational Class[138]

Occupational Class (combined)		Average Compensation Sought	Average Compensation Granted	Percentage
Professional, Administration and Clerical	Mean	$29,632	$3,869	13%
	N	83	95	
Service and Sales workers	Mean	$17,710	$3,031	17%
	N	76	86	
Farmers and trades workers	Mean	$20,420	$3,685	18%
	N	41	41	
Operators and labourers	Mean	$14,757	$2,205	15%
	N	33	38	
Total	Mean	$22,015	$3,320	15%
	N	233	260	
		Sig.: .000 Eta: .277	Sig.: .221 Eta: .130	

Table 5.26 shows that the professional, administration and clerical classes were awarded higher levels of compensation than other occupational classes though they were awarded a lower proportion of what they sought. Although compensation was not linked to income in the same way as recovery of wages lost, this suggests that the differing levels of remuneration affected the levels of compensation sought and granted. Other factors which may have affected the levels of compensation awarded and that may have been tied to the management and professional classes were length of service and occupational status.[139] For example, a manager may have been with a company longer, may have progressed up the managerial ladder and may occupy a more senior position.[140]

[138] For this table with the original coding, see Appendix IX.
[139] For further discussion on potential factors that affected the success of managers, see Table 5.18 above and related text.
[140] See Ch 2, n 335 and 342, and accompanying text, where the Court held that when awarding levels of compensation, factors to be taken into account included that the employee had to be taken as they were found, and the employer's ability to pay.

McAndrew's research also lends weight to this speculation and further suggests that this would affect gender patterns of awards of compensation.[141]

It has also been shown that the Employment Court awarded higher levels of compensation to employees who occupied managerial or administrative positions, averaging $14,000, while those awarded to trades-people averaged $2,000.[142] However, the Employment Court has warned against taking an occupation based approach to awarding compensation. In *Otumarama Private Hospital Ltd v Bell*,[143] the Employment Court stated that 'there is . . . no warrant for treating low paid employees and women as having less tender feelings than their male counterparts in more lucrative positions.' This was also confirmed by Shaw J in *Martin v Park and Clarke Ltd*,[144] where she stated that, '[i]t is difficult to discern a rational explanation for distinguishing the degrees of hurt and humiliation experienced by people by reason of their seniority'. Shaw J went on in a later case to criticise stereotypical attitudes that those who hold higher office have further to fall and suffer greater hurt and that those in low paid positions feel less emotional harm at the loss of their employment.[145] This illustrates the view expressed earlier by one adjudicator that the Employment Court's approach to levels of compensation was inconsistent, making it difficult to follow.

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[141] See McAndrew, above n 81, 373.
[142] J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11, 17.
[143] [1995] 2 ERNZ 491.
[144] Employment Court, Wellington WC35/00, 5 July 2000, Goddard CJ.
[145] *Charta Packaging Ltd v Howard* (Employment Court, Wellington WC20/01, 17 May 2001, Judge Shaw).

Another factor discussed by the courts was the ability of an employer to pay out substantial levels of compensation. While the Employment Court was reluctant to take this into account, it is worth noting that there was no express provision in the *Employment Contracts Act 1991* for employers experiencing financial difficulty to pay compensation by way of instalments. In *Performance Plus Fertilisers Ltd v Slakos*, Goddard CJ stated that:[146]

> if an employer wishes to have its ability to pay taken into account, it needs to adduce some concrete evidence on the subject…there must be some good reason other than mere sympathy for the employer to warrant a reduction of, or deduction from, the award otherwise called for in the name of compensation.

The Employment Court also held that it would be capricious if the law gave a mechanism to impoverished employers to treat employees badly, in contrast with affluent employers who were required to treat their staff well.[147] In contrast to what the Employment Court stated in relation to the award of compensation and ability to pay, they still tended to award higher levels of compensation to managerial applicants who were employed by large employers who had the ability to pay higher sums of compensation.[148] Although this research does not discuss the size of a business, it does show that applicants from the managerial class of employees received higher levels of compensation.[149] Adjudicators also stated in interviews that when determining rates of compensation they took into

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[146] Unreported, WEC 61/95. See also J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.34.
[147] *Sparkes v Parkway College Board of Trustees* [1991] 2 ERNZ 851. See also J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.34.
[148] See J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.17 and 11.34, where it was stated that most of the substantial awards have been made against Government departments, tertiary institutions and large corporations.
[149] See Table 5.26 above.

account the ability of an employer to pay. It is possible to make the assumption that state sector employees may have been in a stronger position as ability to pay was not likely to have been a significant issue for state sector employers.

Table 5.27: Compensation and gender of applicant

	Female	**Male**
Compensation Sought	$15,704	$23,724
N	71	157
Compensation Granted	$2,863	$3,450
N	86	169
Percentage	18%	15%

RWL Sought Significance: .006, Eta: .181 RWL Granted Significance: .317, Eta: .063

Female applicants sought and were granted lower levels of compensation, supporting McAndrew's conjecture, discussed above, that because higher compensation figures were awarded to managers this would affect gender patterns of compensation because most employees in managerial positions were male. This is shown in Table 5.6, which illustrates that there were 88 male managers or professional or associate professional applicants compared to 40 female managers or professionals.[150] Findings almost certainly reflect the lower wage levels of women in the New Zealand workforce, which are evident in Table 5.22. When adjudicators were asked whether they took gender into account when calculating awards of compensation, 14 said no, two said not consciously, while two said they would in certain circumstances.[151] One adjudicator stated, 'well not so much gender, but if a person was a sole income earner or were supporting their children or whatever, those sorts of things could affect it'.

[150] See commentary at Table 5.6 above.
[151] See Ch 6, Table 6.5.

Another factor that may have affected the levels of compensation awarded was the type of representation for both parties to a personal grievance.

Table 5.28: Representative Type (Applicant) and Compensation Sought and Granted

Representative (Applicant)	Average Compensation Sought	Average Compensation Granted	Percentage
Advocate	$19,914	$3,191	16%
N	108	116	
Counsel	$23,736	$3,357	14%
N	121	138	
Self-Representative	$12,400	$4,771	38%
N	5	7	

Comp Sought Significance: .282, Eta: .104 Comp Granted Significance: .677, Eta: .055

Table 5.28 shows that applicants who were represented by counsel sought the highest levels of compensation; those who represented themselves sought the least; and those represented by advocates were somewhere in between. A significant point was that applicants represented by counsel sought almost twice the amount of compensation on average than those who were self-represented. However, it is perhaps surprising to observe from Table 5.28 that those applicants who were granted the highest levels of compensation on average were those who represented themselves (38% of what they sought). This contrasts with findings from Ian McAndrew and Kathryn Beck who examined decisions and damages in the Employment Tribunal and the Employment Relations Authority.[152] They found that if employees represented themselves, they had a

[152] K Beck and I McAndrew, 'Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority', paper presented to the NZLS Employment Law Conference, November 2002, 211.

lower rate of success than if they were represented by counsel or advocates.[153] A possible reason for the difference may have been that the research by McAndrew and Beck examined all adjudicated decisions over a longer period by the Employment Tribunal and was not limited to personal grievances over one year.[154] Interviews with adjudicators revealed that they tended to take a more relaxed and informal approach to self-represented parties. It is possible, although a tenuous supposition, to assume that some of the legal requirements were relaxed, which may have resulted in more substantial compensation awards for self-represented parties.

Research conducted by Ian McAndrew over the period 1992 to 1997 inclusive found that applicants represented by counsel were more likely to receive awards of compensation over $10,000 than applicants who employed other types of representatives or who represented themselves. McAndrew also found that applicants who chose to represent themselves were more likely than represented applicants to receive no compensation.[155] This contrasts with the present study and Table 5.28, which shows that self-represented applicants received higher levels of compensation on average than represented applicants. It should be acknowledged that McAndrew's research took place over a six year period and over a significantly larger database, whereas this research only focussed on one year, 1997, which may have explained the differential. A further difference between the two pieces of research was that McAndrew's work considered actual levels of compensation

[153] Ibid 218. As with McAndrew, above n 81, success was measured in terms of a finding of a personal grievance and did not take into account remedies sought and granted.
[154] Ibid. McAndrew and Beck considered decisions from the last 18 months of the Tribunal to 30 September 2000. See Table 5.19 above and related text, which shows that in 1997 there were only 13 personal grievances where parties chose to represent themselves.
[155] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 *NZJIR* 365, 375.

granted and this research focussed on average levels of compensation over different representational categories.

Further research into awards of compensation made by the Employment Relations Authority by Ian McAndrew and Kathryn Beck showed that:[156]

> [s]uccessful grievants represented by lawyers were distinguished from all others, with those represented by lawyers averaging compensation awards of $6,580 and those with any other representation, including self-representation, averaging compensation at the markedly lower level of $3,447.

One of the reasons for the difference in findings between this research and the above statement from the research of McAndrew and Beck may have been that their research covered a transitional period where the Authority had jurisdiction under both the *Employment Contracts Act 1991*, and the *Employment Relations Act 2000*. However, the statement above specifically related to awards of compensation under the *Employment Relations Act 2000*.

The type of representation chosen by respondents could also have an impact on compensation granted to the applicant, as illustrated in Table 5.29.

[156] K Beck and I McAndrew, 'Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority', paper presented to the NZLS Employment Law Conference, November 2002, 230. See also J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 11.17.

Table 5.29: Representative Type (Respondent) and Compensation Granted to Applicant

Representative (Respondent)	Average Compensation Sought	Average Compensation Granted to Applicant	Percentage
Advocate	$18,066	$3,151	17%
N	61	69	
Counsel	$24,735	$2,482	10%
N	26	31	
Self-Representative	$8,813	$2,928	33%
N	16	16	

Comp Sought Significance: .012, Eta: .215 Comp Granted Significance: .000, Eta: .388

Table 5.29 shows that if the respondent was represented by counsel, the applicant received the least compensation on average. This could be due to counsel being able to adduce more sophisticated legal arguments against the applicant's case or could have been the result of good tactical judgment by counsel. This is consistent with previous research undertaken by Ian McAndrew who found that if respondents were represented by counsel the applicant was more likely to receive no compensation. However, although there was a large difference in the percentage of compensation sought and awarded to applicants between respondents represented by counsel and self-represented respondents.[157] In contrast, McAndrew found that if the respondent was self-represented, the applicant was least likely to receive an award of compensation over $5,000.[158]

[157] I McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24 NZJIR 365, 375. See also I McAndrew and K Beck, 'Decisions and Damages – Are They Predictable?' (2002) New Zealand Law Society Employment Law Conference, 209, 218.
[158] Ibid. See also Tables 5.19 and 5.20, which illustrate representation and applicant success.

Table 5.30: Cause of action and remedies

	Unjustifiable Dismissal	Unjustifiable Constructive Dismissal	Unjustifiable Action	Other	Statistics
Recovery Wages Lost Sought	$19,238	$8,507	$11,280	$46,746	Sign .25 Eta .149
N	160	19	3	4	
Recovery Wages Lost Granted	$4,275	$1,921	$1,458	$2,001	Sign.43 Eta .118
N	171	22	4	4	
Compensation Sought	$22,107	$16,109	$26,409	$27,857	Sign .43 Eta .109
N	194				
Compensation Granted	$3,514	$2,517	$2,723	$2,250	Sign .6 Eta .085
N	215	24	15	8	
Total Sought	$45,281	$21,936	$36,711	$15,552	Sign.21
N	234	25	16	38	Eta .12
Total Granted	$6,954	$3,937	$3,814	$2,429	Sign .04
N	276	30	20	41	Eta .153

There were variations in outcome between the three different causes of action, illustrated in Table 5.30 above. Unjustifiable dismissal cases produced the highest amounts claimed for recovery of wages lost[159] and the highest total remedies sought. Generally, applicants in unjustifiable dismissal cases sought and were granted the highest remedies. Employees bringing unjustifiable dismissal claims probably claimed or were entitled to a higher level of recovery of wages lost as their source of income had disappeared with the dismissal. Thus, employees were seeking both redress for loss of income due to the dismissal, loss of earnings between the date of dismissal and date of hearing, and loss of future earnings. Claims for compensation were highest for unjustifiable action. However, compensation awarded was higher on average for claims of unjustifiable dismissal, which suggests there was more weight given to humiliation, loss of dignity and injury to feelings in cases where an employee had been dismissed. Cases of unjustifiable action did not necessarily

[159] This excludes 'Other' where there were only four claims for RWL, with one substantial claim.

result in the applicant losing employment, whereas unjustifiable dismissal cases resulted in loss of employment and therefore loss of income.

The majority of personal grievance cases decided under the *Employment Contracts Act 1991* were for unjustifiable dismissal (75 percent of all personal grievances that the Employment Tribunal determined in 1997).[160] Under the previous *Labour Relations Act 1987*, reinstatement was the primary remedy in unjustifiable dismissal cases.[161] Under s 228 of the *Labour Relations Act 1987*, if the Grievance Committee or Labour Court found that the worker did have a personal grievance then, wherever practicable, reinstatement had to be awarded under s 227(a). In contrast, under the *Employment Contracts Act 1991* reinstatement was no longer the primary remedy but was one of a number of possible remedies available to be awarded by the Employment Tribunal.[162] Where the Employment Tribunal or the Employment Court determined that an employee had a personal grievance they may have awarded reinstatement. Therefore, the Employment Tribunal had discretion as to whether to order reinstatement if an unjustifiable dismissal had been proved. As reinstatement was no longer a primary

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[160] See Table 5.2 above.

[161] *Labour Relations Act 1987*, s 228 stated that: reimbursement was to be a primary remedy – (1) Where (a) the remedies sought by or on behalf of a worker in respect of a personal grievance include reinstatement (as described in section 227(a) of this Act); and (b) it is determined that the worker did have a personal grievance – the Grievance Committee or the Labour Court shall, whether or not it provides for any of the other remedies provided for in s 227 of the Act, provide, wherever practicable, for reinstatement in accordance with section 227(a) of this Act.

[162] *Employment Contracts Act*, s 40 stated that: remedies – (1) where the Tribunal or the Court determines that an employee has a personal grievance it may, in settling the grievance, provide for any one or more of the following remedies:
…(b) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee….
In England reinstatement was the primary remedy in cases of unfair dismissal, and if this was not appropriate re-engagement (i.e., reappointment to a comparable position with the same or associated employer) was an alternative remedy, as was compensation. See the *Employment Protection Act 1976 (UK)*.

remedy in unjustifiable dismissal claims under the *Employment Contracts Act 1991*, it was interesting to determine how many employees still sought and were awarded reinstatement.

5.4.7(B) REINSTATEMENT

Table 5.31: Reinstatement Sought and Granted

	Reinstatements
Reinstatement Sought	16
Reinstatement Granted	5
Total Number of Unjustifiable Dismissals[163]	337

Table 5.31 shows of a significant total of unjustifiable dismissal claims, only a small proportion sought reinstatement. Out of the fraction seeking this remedy, only five reinstatements were granted. This may have been for a variety of reasons such as applicants believing that reinstatement was not a viable option depending on the circumstances of the dismissal and the nature or context of the work environment.[164] Further, dismissed employees had a duty to mitigate their loss by seeking alternative employment.[165] It may also have been that some of those who sought reinstatement were using this potential remedy as a tactic to encourage the employer to settle the claim with higher compensation. The latter view was held by some adjudicators who took into

[163] In this table, unjustifiable dismissal includes claims of constructive dismissal, unjustifiable dismissal/constructive dismissal, unjustifiable dismissal/procedural fairness, unjustifiable dismissal/unjustifiable action and unjustifiable dismissal.
[164] For adjudicator comments on reinstatement see Chapter 6.4.12(a). For comments from parties and their representatives on remedies sought and granted see Chapter 7.5.8 and 7.6.3.
[165] *General Motors Ltd v Lilomaiava* [1997] ICJ 109. See also *Schollum v Andrew*, unreported, AEC 45/96. In *Edwards v Society of Graphical and Allied Trades* [1970] 1 All ER 905, 910, Buckley J stated that a dismissed employee must diligently try to find other similar employment 'of a kind which he can reasonably be expected to accept having regard to his standing, experience and his personal history'. See Chapter 2.4.4(a). See also *Mazengarb's Employment Law (NZ)* ERA 128.4.

account whether the claim for reinstatement was real, or simply a tactic when determining whether to order reinstatement.[166] Another potential reason why employees eschewed reinstatement was the possibility of delay in a personal grievance being heard and the outcome being determined. Whether there was a significant delay in hearing claims for reinstatement could have depended on whether the Employment Tribunal gave priority to personal grievances that involved claims for reinstatement. Alastair Dumbleton, Chief of the Employment Tribunal for the duration of its existence, indicated:[167]

> As an exercise of discretion rather than firm policy the tribunal in some cases did bump some reinstatement cases up the queue to give them an earlier hearing. Obviously we would look at the merits of each case taking into account factors such as a recent dismissal and no delay by applicant in applying; genuineness of wish to be reinstated; and realistic chance of reinstatement if dismissal was later found to be unjustified. Sometimes the Court told us to give priority where they had ordered interim reinstatement. It was reasonably rare though for this to happen.

Whilst reinstatement was no longer the primary remedy for dismissed employees under the *Employment Contracts Act 1991*, it was still a remedy which was available, which few employees sought. This may have been due to the delay in receiving a hearing date, or could have been due to reinstatement not being an appropriate remedy under the circumstances. Alternatively, as employees were obliged to mitigate their loss, suitable alternative employment may have been found.

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[166] For a discussion of adjudicators' views of reinstatement and what they took into account when determining whether or not to order it, see Chapter 6.4.12(a).

[167] Personal Correspondence between Linda Beck and Alastair Dumbleton, re Prioritisation of Reinstatement Claims in the Employment Tribunal, 17 September 2004. This was also confirmed by personal correspondence with Deborah Downie, Secretary of the Employment Tribunal, 27 September 2004.

5.4.7(c) TOTAL REMEDIES

Table 5.32: Total Average Remedies[168]

	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Total Average
Total Sought	$41,922	$52,301	$31,258	$39,133	$22,084	$39,369
N	122	28	59	94	10	313
Total Granted	$6,768	$7,118	$6,146	$4,338	$6,723	$6,031
N	141	28	60	96	10	335

Remedies sought Significance: .83, Eta: .069 Remedies granted Significance: .231, Eta: .13

The above table shows that the average amount of remedies sought in Hamilton was higher than in any other jurisdiction. Statistically, this was because there were fewer cases heard in Hamilton, and three significantly higher than average claims skewed the figures. The figures also show that overall there was a substantial disparity between remedies sought and granted. There could have been several reasons for this disparity. It may have been due to:

- representatives submitting unrealistically large claims;
- unrealistic expectations of employees which may have been enhanced by representatives;
- the nature of the claim or the facts of the case;
- value judgments of the adjudicators and their differing backgrounds;
- adjudicators adopting a compromise solution between the differing interests of both parties;
- contributory fault; and
- mitigation.

[168] Total average remedies comprised of all remedies sought and granted in adjudication, including compensation, recovery of wages, recovery of wages lost, holiday pay, loss of benefit etc. It should be noted that detailed figures of remedies sought and granted were not always stated and therefore the information available only reflects what details are provided in the decisions.

It was a strong possibility that the nature of a personal grievance taken could have had an impact on the remedies granted. For example, a clear-cut unjustifiable dismissal may have led to a more substantial remedy.[169]

Table 5.33: Percentage Awarded by Individual Adjudicators

	Total Sought	**Total Granted**	**Percentage awarded**
Adj 1 N	$56,089.19	$3,725.80	7%
Adj 2 N	$23,499.00	$5,209.00	22%
Adj 3 N	$34,396.08	$8,077.26	23%
Adj 4 N	$33,013.76	$4,273.72	13%
Adj 5 N	$57,332.58	$9,719.52	17%
Adj 6 N	$10,846.13	$2,615.25	24%
Adj 7 N	$24,732.07	$5,043.67	20%
Adj 8 N	$34,250.87	$4,318.35	13%

Table 5.33 shows that the adjudicator determining the outcome of the personal grievance could have had an impact on the outcome of the case in terms of financial settlements. To determine this, only adjudicators who adjudicated more than 12 cases were considered to ensure confidentiality was taken into account. To illustrate the variation between adjudicators, Table 5.33 shows the total amounts granted as a percentage of the total sought. Interestingly, the adjudicator who was asked by applicants for the second highest amount in total remedies, awarded the lowest proportion of all adjudicators – awarding only seven percent of the total remedies sought. Conversely, the adjudicator who was asked by applicants for the second lowest of total remedies, awarded the highest

[169] For adjudicators' approaches to remedies, see Chapter 6.4.12.

percentage of claims – 24 percent of what was sought.[170] Again, it is possible that a reason for the variation in remedies granted by different adjudicators related to the amount of contributory fault attributed to the applicant.[171]

The adjudicator who awarded the least percentage of total remedies sought believed that you could have more than 50 percent contributory fault, and in an interview stated:

> I must admit I'm sceptical of some of the court decisions…which say that 50% is a very high measure of contribution, because that means the employee is equally culpable as the employer, and such awards should be rare. I've gone over 50% because I think the practical reality is that sometimes employees probably deserved to be dismissed for their conduct but the employer has made some mistake along the way which has led to a rather lucky finding of unjustifiable dismissal.

This comment clearly illustrates that in certain circumstances this adjudicator was prepared to reduce remedies awarded substantially and on occasion more than 50 percent, which could explain why there is such a disparity between remedies sought and granted for this particular adjudicator. Similarly, the adjudicator who awarded the second lowest percentage of remedies sought also believed that there could be more than 50 percent reduction in remedies granted as a result of contributory fault.

> I was in private practice before ACC came in and I've still got the old habit of 25% chunks so it's 25, 50, 75, 100, and I've always been quite liberal in seeing contribution, despite what the Chief Judge has said in different cases.

Arguably, the approach taken by this adjudicator could have resulted in some financial disadvantage to the applicant, as 25 percent blocks is an arbitrary measure. While this adjudicator may have found this to be a very useful measure of contributory fault, it may

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[170] Couch notes that (with respect to costs) while individual adjudicators are consistent, there was wide variation between adjudicators. See Couch, above n 100, 135.
[171] For a discussion of how contributory fault could affect remedies granted, see para 5.4.7

not have taken into account all aspects of contribution nor been sensitive to subtle differences.[172] This approach contrasts with the principles set out by the Court, where remedies affected by the contributory fault of the employee should have been reduced in an equitable manner.[173]

Adjudicators were also asked in interviews how their approach to awarding remedies was affected by a perception that unreasonable remedies were being sought. Both of the adjudicators above took a negative view of unrealistic claims, with one stating that such remedies simply would not be awarded, and the other stating that it probably unconsciously biased adjudicators against the applicant as they might wonder what their motives were.[174]

As Table 5.33 included all remedies sought and granted, another possible reason for the disparity could have been that some applicants, when seeking recovery of wages lost, may have claimed a higher rate of recovery than three months and adjudicators were reluctant to use their discretion to grant recovery of wages lost beyond three months.[175]

5.4.7(D) THE EFFECT OF CONTRIBUTORY FAULT ON REMEDIES

Contributory fault has not been included as a specific category in the database because it was too difficult to measure, as it was not always clear from the decisions what amount had been attributed to contributory fault and consequently reduced from the awarded

[172] For a more detailed discussion of adjudicators' views on awarding remedies see Chapter 6.4.12.
[173] See Chapter 2.4.4(d).
[174] Ibid.
[175] For a discussion of this see para 5.4.6(a) and Chapter 6.4.12(b).

remedies.[176] It is important to note, however, that contributory fault was relevant to all potential remedies and not just to recovery of wages lost.[177] In *Ark Aviation Ltd v Newton*, the Court of Appeal stated that:[178]

> [a] contract of employment is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing…An employee guilty of a fundamental breach of those contractual obligations arguably cannot be said under s40(1) to have lost wages or other money or any benefit, or under s 41(1)(b) to have lost remuneration, as a result of a personal grievance. If that is so, no obligation to order reimbursement arises at all. Nor would reinstatement or compensation for humiliation, loss of dignity or injury to feelings, both of which are discretionary remedies, be appropriate.

The Court also held that:[179]

> [w]hile it is not strictly in issue in the present case we should make it clear that we do not rule out the possibility that in some situations misconduct of an employee only discovered after a dismissal may be so egregious as to require the discretion to provide for a remedy under s 40(2) not to be exercised at all in favour of the employee whose grievance has been established. We have in mind deliberate and serious misconduct by an employee, which significantly affects the employer, and which amounts to a serious abuse of the trust and confidence that underpins the relationship.

This means that in some circumstances although a personal grievance may have been proved, the employee's conduct may have been so damaging to the relationship of trust and confidence between the parties, that the employee was not entitled to receive compensation under the *Employment Contracts Act 1991*.[180] This is so, even where the damaging conduct occurred separately from the incident(s) that resulted in a legitimate

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[176] See above n 3 and accompanying text.
[177] For a discussion on contributory fault, see Chapter 2.4.4(d).
[178] [2002] 2 NZLR 145, 156 per Gault, Blanchard, and McGrath JJ. The practice of making 'nil awards' was an already established practice in the Employment Court in cases where the contributory conduct of the employee warranted such a reduction of remedies despite a personal grievance having been established. See *Finsec v Australian Mutual Provident Society* [1992] 1 ERNZ 280; *COMPASS Union of NZ Inc v Foodstuffs (Auckland) Ltd* [1992] 3 ERNZ 16; *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971. See also M Hawkesby, 'A Pyrrhic Victory' [1998] *ELB* 67.
[179] *Ark Aviation Ltd v Newton* [2002] 2 NZLR 145, 155.
[180] In *Bishop v Cambridge Cosmopolitan Club Inc*, unreported, 26 November 1996, AEC 78/96, Travis J affirmed this approach by commenting that in this case, the actions of the employee 'justified a finding that the appellant was totally responsible for the situation that led to his dismissal.'

personal grievance. Gordon Anderson commented that the Court of Appeal was moving toward a stance that there would be no personal grievance or that remedies would be reduced to nil where – following a post-dismissal investigation – an employer could prove a breach of contract which if known at the time would have justified the dismissal.[181] Interviews with adjudicators revealed that in relation to contributory fault, they took different approaches and disagreed in a number of areas, including the directions of the Court and whether they should be followed.[182] In particular, adjudicators disagreed as to whether you could have more than 50 percent contributory fault. This contrasts with the decisions discussed above, where the Court established that remedies could be reduced by 100 percent.

5.4.8 COSTS

Under s 98 of the *Employment Contracts Act 1991*, the Employment Tribunal had the discretion to make an order for the award of reasonable costs to any party.[183] Determining the level of costs sought from and granted by the Employment Tribunal represented a measure of whether there was an access barrier for employees wishing to take a personal grievance. For instance, it may have been that the ultimate cost of taking a personal grievance was prohibitive in cases where parties were required to meet all or part of the costs associated with it. Thus, the significant costs such as lodging fees, witness expenses, and costs of representation could have had a negative financial impact on the applicant, even if successful in establishing a personal grievance. For example, the

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[181] G Anderson, Recent Case Comment, 'EC Act, ss 40 and 41 – Personal Grievance – Reduction of Remedies – *Ark Aviation v Newton*' [2001] 7 ELB 133.
[182] See Chapters 2.4.4(d) and 6.4.12(e) for further discussion on contributory fault.
[183] For a discussion of this discretion see Chapter 2.4.3(d).

Employment Tribunal may have ordered costs to lie where they fell so that the employee may still have been burdened with legal costs.[184] It was also possible that unsuccessful employees may have had costs awarded against them.

Table 5.34: Average costs sought and granted

	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Total Average
Costs Sought	$2,885	$8,098	$5,126	$4,695	$4,717	$4,616
N	22	6	26	42	6	102
Costs Granted	$1,080	$2,539	$1,984	$2,517	$1,783	$2,021
N	27	7	28	49	6	117
Percentage	37%	31%	39%	53%	38%	-

Costs sought Significance: .258, Eta: .23 Costs granted Significance: .759, Eta .128

It should be noted that of all the Hamilton cases reported, only six recorded costs awards. In addition, one of the claims made in Hamilton was significantly larger than the national average; hence the costs statistic for this jurisdiction was inflated. This table shows that generally, costs granted were less than half of the amount of costs sought. In *Binnie v Pacific Health Limited* the Court of Appeal held that in determining the level of costs to be awarded against the respondent, a general starting point was 66 percent contribution to costs or two-thirds.[185] Assuming the costs sought by applicants in Table 4.34 were an accurate representation of the costs incurred by employees, the cost of taking a personal grievance could have been seen as substantial from the perspective of a dismissed employee.[186] This was further exacerbated by the court practice of awarding significantly less than the costs claimed.

[184] As noted above, parties were partly successful if they were not awarded all of what they sought. This included costs sought and granted.
[185] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, per Keith, Tipping and Glazebrook JJ.
[186] See Chapter 6.5.8 for a discussion of employee responses to the cost of lodging a personal grievance.

Adjudicators were asked whether they took the following factors into account when awarding costs:

- how the case was conducted;
- how the parties acted;
- the significance of the case to the parties;
- preparation time;
- arguments lacking substance;
- legalistic/technical arguments; and
- actual costs.

Adjudicators' responses were varied as to what weight they gave to these factors or whether they took them into account at all. However, all adjudicators agreed that if any factor extended the hearing time unnecessarily, they would take it into account when awarding costs.[187]

Table 5.35: Length of Hearing and Average Costs Sought and Granted

Length of Hearing (days)	Costs Sought	Costs Granted	Percentage
0.5	$4,527	$1,083	24%
N	3	3	
1	$2,576	$984	38%
N	43	59	
2	$6,199	$2,602	42%
N	16	16	
3	$7,453	$2,197	29%
N	5	6	

Costs sought significance: .000, Eta: .549 Costs granted significance: .000, Eta: .525

[187] For a more detailed discussion of adjudicators' views on costs, see Chapter 6.8.

Table 5.35 shows the average costs sought by applicants in the differing lengths of hearings.[188] The table shows that in hearings lasting half a day, applicants sought and were granted proportionately higher costs than in hearings lasting one day. This was likely a result of few hearings lasting half a day, skewing the results. In adjudications that lasted two days average costs sought were $6,199, while in adjudications lasting three days, average costs sought were $7,453. However, the average costs awarded for hearings of two days exceeded those awarded for hearings of three days. Small numbers may have affected these results. The data collected is incomplete as not all decisions of the Employment Tribunal have fully recorded costs sought and granted.[189] Therefore, a significant amount of weight cannot be given to the above data as the sample was not large.

[188] In this Table and Table 5.36 below, 'No. of cases' refers to the number of cases where costs information was available from the decisions.
[189] See above n 3 and accompanying text.

Table 5.36: Occupational Class of Applicant and Average Costs Sought and Granted[190]

Occupational Class (combined)		Costs sought	Costs granted	Percentage
Professional, Administration and Clerical workers	Mean	$6586.03	$3738.64	57%
	N	25	29	
Service and sales workers	Mean	$3273.42	$1256.30	38%
	N	29	30	
Farmers and trades workers	Mean	$5126.86	$1819.31	35%
	N	21	26	
Operators and labourers	Mean	$3254.75	$1249.16	38%
	N	16	18	
Total	Mean	$4607.91	$2096.08	45%
	N	91	103	
		Sig: .328 Eta: .320	Sig: .478 Eta: .274	

Table 5.36 shows the occupational class of applicants and the average costs sought by applicants and granted by the Employment Tribunal. Again, this table has limited value as in many instances the detail of costs sought and granted was not included in either the substantive decisions or costs decisions. As a result, this means that little weight can be given to the above averages as the information obtainable from the database was limited and therefore the averages may not give an entirely accurate picture of applicant costs sought and granted. In addition, in some occupational classes there is no information as to applicant costs sought and granted. In the professional category there was no information as to costs sought, but some limited information as to costs granted was available.

[190] For the average costs sought and granted based on original classifications of occupational classes, see Appendix IX.

Further, it may be possible to infer that personal grievances involving management and management/general classes were more complex and therefore attracted higher levels of costs sought and granted than other occupational classes.[191]

5.4.8(a) Availability of Legal Aid

For personal grievances brought under the *Employment Contracts Act 1991*, legal aid was available to parties depending on their financial circumstances.[192] If an unsuccessful party to a personal grievance was in receipt of legal aid, the costs awarded against that party were limited to the amount of the contribution required of them by the Legal Services Board, unless exceptional circumstances existed.[193] Legal aid was available for the adjudication process and appeals to the Employment Court, and also extended to the mediation process offered by the Employment Tribunal.[194] Legal aid was not readily available under the previous *Labour Relations Act 1987* as the process was generally confined to union members.[195] Applicants bringing personal grievances were therefore usually represented by unions and no legal costs would have been incurred. However, union members could have opted to engage the services of private legal representation; alternatively, it may have been that employees were exempt from union membership and thus incurred their own legal costs.[196]

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[191] See Table 5.18 above and accompanying text.
[192] *Legal Services Act 1991*, ss 28–31. For discussion on the merits of the Legal Aid system see B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile', [1995] NZL Rev 282, 302-4. See also Chapter 8.2.3(a).
[193] *Legal Services Act 1991*, s 86(2). For a discussion of this see Chapter 2.4.3(d), and for a discussion of adjudicators' views on the exceptional circumstances rule, see Chapter 6.8.13.
[194] *Legal Services Act 1991*, s 19; *Employment Contracts Act 1991*, ss 78 & 79.
[195] *Labour Relations Act 1987*, sch 7, cl 2, 3 & 4.
[196] *Labour Relations Act 1987*, ss 82–3. Union members could apply for exemption from union membership on the grounds of genuine objections to becoming or remaining a union member. See Chapter 6.8 for adjudicator's comments relating to legal aid and costs.

Under s 28 of the *Legal Services Act 1991*, an applicant could be eligible for legal aid if their disposable income for the 12 months immediately preceding the personal grievance did not exceed that stipulated by the District Sub-committee of the Legal Services Board and the applicant did not have disposable capital such that it appeared they could proceed without legal aid.[197] Disposable capital was the total assets of an applicant after any debts secured against those assets and the following interests were deducted: interest in a home; interest in a motor vehicle used principally as that person's means of transport for domestic purposes; value in chattels; contingent liabilities which may mature in the next six months; actual debts; and amount prescribed for dependent children, spouse or other relatives.

Interest in a home, a motor vehicle or chattels could also be taken into account if in the opinion of the District Sub-committee it would be inequitable not to include those assets. The above criteria restricted eligibility for legal aid. This therefore could have presented an issue of access to the personal grievance adjudication process for many potential applicants who may have been ineligible for legal aid. A further restriction was the fact that the resources of spouses and parents could be taken into account in determining eligibility. This meant that even if an applicant had insufficient resources and may have qualified for legal aid, the resources of their partner and family might have barred access to legal representation, regardless of the type or quality of relationship with the spouse or parents.

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[197] *Legal Services Act 1991*, ss 28 and 29.

The database of all Employment Tribunal decisions from 1997 established as part of this research contained limited information about applicants who had received legal aid. This was due to the fact that decisions did not always clearly identify whether applicants were in receipt of legal aid.[198] A tiny proportion of decisions did identify legal aid recipients but the number was so small that this cannot be seen as a representative sample nor could it be accurately analysed in comparison with other research.[199]

5.4.9 TIME FACTORS

A potential concern for those using the personal grievance system was the time delay between a personal grievance arising and the hearing of the case, and then the delay in the decision being provided by the adjudicator. This delay was contrary to the expressed purpose of the legislative provision.[200]

Table 5.37: Average Wait from Event Precipitating Personal Grievance to Hearing (Months)

Jurisdiction	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Total
Time in months	16.98	15.91	17.15	15.04	15.41	16.43
N	150	31	51	82	12	326

Significance: .418, Eta: .098

Table 5.37 shows the time lapse until the hearing was considerable. In comparison, in the Industrial Tribunal in England, the majority of applications (31 percent) took more than

[198] See above n 3 and accompanying text.
[199] It was only possible to determine from the decisions that legal aid was granted in five cases.
[200] See above n 2.

eight weeks and less than three months from application to hearing.[201] Only three percent of applications took more than six months and less than nine months to reach a hearing.[202] The distinction between the two systems was significant. This may have been because there was a backlog of personal grievances for the Employment Tribunal that occurred under the *Labour Relations Act 1987*.[203]

Reinstatement may not, therefore, have been a practical remedy. If the applicant had sought reinstatement, by the time the hearing was conducted, let alone the decision made, it was often impractical for reinstatement to be granted as the position in question may have already been filled by a new employee. The Employment Court has commented that caution was essential when considering the practicalities of immediate reinstatement, particularly where the employee had been out of work for a considerable length of time, or where the position was a specialist one where there were a limited number of employees.[204] The Employment Court was concerned that a smooth transition of reinstatement should occur, for both the employee and the employer. As discussed above, on occasion the Employment Tribunal did give priority to cases where reinstatement was a remedy sought. However, this did not occur frequently.[205]

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[201] Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 201.
[202] Ibid.
[203] See Chapter 2.5. It should also be noted that eligibility to take a claim for unfair dismissal was limited to employees who had been employed for one year's continuous service (or for two years if there were less than 20 workers employed); that the employee was not past retirement age (which was 60 for women and 65 for men); and the definition of dismissal did not include where an employer terminated a contract, did not renew a fixed term contract, or constructive dismissal. See Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 19.
[204] *Port of Tauranga Ltd v Youard* [1999] 2 ERNZ 553, 562.
[205] See above n 167 and accompanying text.

Further, if an applicant was in serious financial difficulty and was dependant on receiving wages lost, the delay could have caused unnecessary hardship. A significant stress for applicants was simply that the issue was not being resolved.[206] If the personal grievance complained of was of a sensitive nature, for example sexual harassment, the delay was less than ideal.[207]

An additional issue for employees could have been that if they successfully obtained new employment, their compensation may have been reduced.[208] Alternatively, it may not have been possible for an employee to obtain further employment as Employment Tribunal hearings and decisions were publicly accessible and the fact that they had taken a personal grievance was a matter of public record that sometimes attracted media attention. A potential issue for respondent employers with prolonged delay from the date the personal grievance occurred to the date of the hearing was the potential for high awards for lost wages up until the date of hearing. This could have been exacerbated if an employer had chosen to employ someone to fill the position and was therefore responsible for the payment of two employees for the same period of time. Adjudicators gave varied reasons as to why they believed delays occurred.[209]

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[206] For a discussion of responses from employees regarding the question of delays and the cost of taking a personal grievance, see Chapter 7.5.8.
[207] See Chapter 6.4.10 for discussion on the impacts of delay.
[208] It should be noted that employees were required to mitigate their loss by trying to find alternative employment, '… of a kind which he can reasonably be expected to accept, having regard to his standing, his experience and his personal history.' *Edwards v S.O.G.A.T.* [1970] 1 All ER 905, 911, per Buckley J. For a useful summary of case-law, see *Schollum v Andrew*, unreported, AEC 45/96. See also *Personal Grievances*, paragraph 11.13A.
[209] See Chapter 6.4.10 for discussion on the issue of delays.

Table 5.38: Average Length of Hearing (Days)

Jurisdiction	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Average Length
Length in Days	1.48	1.29	2.20	1.48	2	1.60
N	160	31	58	91	12	352

Significance: .001, Eta: .237

The length of the hearing may have been a significant issue for parties, especially in regards to the resulting representation cost if a hearing was protracted. In comparison to Table 5.38 above, 61 percent of applicants surveyed in England said that their hearing in the Industrial Tribunal took half a day or less, while 29 percent said that their hearing took between half a day and one day.[210] Only eight percent said that their hearing took between one and a half and two days, while only three percent said that the hearing took more than two days.[211] It can be seen that hearings in the New Zealand Employment Tribunal were generally longer on average than those in the English Industrial Tribunal. In the Industrial Tribunal, if a case was not completed within a day, long delays could have resulted between the day of hearing and the later continued hearing.[212] This was because the Industrial Tribunal used part-time chairpersons and lay members on an ad hoc basis, which meant that it may have been difficult for members to find a mutually acceptable date to reconvene.[213] Potential difficulties with reconvening may have been a positive incentive for the Industrial Tribunal to resolve the case within a day.

[210] Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 205.
[211] Ibid.
[212] Ibid.
[213] Ibid.

Hearings in Wellington were on average the longest, although the disparities were not significant. It is possible that Wellington had slightly longer hearings because of the case management system used there, where a significant number of personal grievance claims were resolved without the necessity for adjudication to occur at all or for preliminary matters to have been resolved prior to adjudication.[214] It was therefore possible that the remaining material being heard at adjudication in Wellington was more complex in nature and thus took more time. Another possibility was that as most public sector cases were adjudicated in Wellington and their content may have been more complicated, this resulted in prolonged hearings.[215]

[214] See Chapter 5.4.9, where case management is discussed in relation to caseload.
[215] Fifty-seven percent of all public sector grievances were heard in Wellington. See Table 5.11 above.

Table 5.39: Occupational Class and Length of Hearing

NZ Census categorisation of Occupational Class	Average Length of hearing (days)	Frequency
Legislators, Administrators and Managers	1.85	31
Professionals	1.94	31
Technicians and associate professionals	1.62	50
Clerical workers	1.52	23
Sales and Service workers	1.41	86
Farm workers	1.81	27
Trades workers	1.52	33
Plant and machine operators and assemblers	1.82	37
Elementary occupations	1.00	17
Total	1.61	335

Significance: .175, Eta: .185

Table 5.39 shows that personal grievances taken by professional employees tended to last the longest, and would therefore use up most representative time, and therefore cost more. Further to this, personal grievances brought by public sector employees took the longest lasting an average of 2.64 days. Hearings for those employed in the voluntary sector and health sector also took longer, with average hearing times of 2.50 and 2.43 days respectively. One reason for the extended hearing times in these areas of personal grievances may have been the complexities of the cases. For example, a public sector personal grievance may have had extraneous circumstances to consider under the *State Sector Act 1988* in addition to obligations under the *Employment Contracts Act 1991*.[216]

[216] Based on the data in Table I, Appendix IX.

Another possible financial issue for applicants wishing to take a personal grievance was the cost of representation. As determined in *NZ Airline Pilots Assn v Registrar of Unions*[217] a general 'rule of thumb' regarding the cost of preparation time was that preparation for litigation is approximately twice to threefold the time spent in court.[218] In the absence of accurate information as to the actual time reasonably expended in preparation, that 'rule of thumb' was the only reliable indicator. Therefore, the disparities between length of hearing in each centre could have affected the preparation time and hence the cost of representation, as the longer the hearing, the greater the preparation time and consequently the higher the assumed cost. Given that there was a significant gap between costs sought and granted,[219] the 'rule of thumb' used may have been disadvantageous to those whose actual costs were significantly higher but could not be shown. Therefore, if a representative needed to take more time depending on the nature and complexity of the case, the application of the general 'rule of thumb' could have resulted in insufficient costs being awarded and the party bearing the extra cost.[220]

A possible issue for employers was the cost of their absence from their place of work during hearing time. If employers had to pay for representation as well as appear at the

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[217] [1989] 2 NZILR 550.
[218] *NZ Airline Pilots Assn v Registrar of Unions* [1989] 2 NZILR 550, 551-552, and *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613. In *Airline Pilots* and in *Reid v Fire Service Commission* [1995] 2 ERNZ 38, Goddard CJ identified other factors to be considered in awarding costs, including the complexity of the case, the length of the hearing and preparation time. See also G Anderson, B Banks, J Hughes, K Johnston, M Leggat, and P Roth (eds) *Employment Law Guide 4th Edition* (1998) 832–836.
[219] See Table 5.34 above.
[220] However, see above n 217, which notes that in awarding costs other factors such as the complexity of the case, the length of the hearing and preparation time could also be considered at the discretion of the court.

hearing this could have resulted in increased costs both to themselves and possibly to their business. Therefore, length of hearing was also a significant issue for employers.

Table 5.40: Average Time Lapse Between Hearing and Decision (Days)

Jurisdiction	Auckland	Hamilton	Wellington	Christchurch	Dunedin	Total Average
Days	73.12	64.45	52.93	39.39	131.54	61.87
N	159	31	74	94	13	371

Significance: .001, Eta: .228

Table 5.40 shows the average time lapse between the date of hearing and the date of the decision in each jurisdictional centre. Whilst Dunedin shows the longest time lapse, it should be noted that five of the thirteen Dunedin cases were very protracted. Of note is the fact that the Christchurch jurisdiction had the highest caseload per adjudicator but the shortest average delay in the decision being issued.[221] The Auckland jurisdiction had the highest number of cases and adjudicators but had the longest delay (apart from Dunedin) in decisions being issued. Again, this could have had unnecessary adverse effects on the parties involved. If the personal grievance had been an unjustifiable dismissal claim, the applicant may have been unable to obtain any further employment and the financial consequences in the intervening period may have been significant. There may have been a real need for compensation to be made available at an early opportunity. Delay in the decision could have caused further financial problems regarding the cost of representation: if costs had not been awarded at an early stage it may have been that some representatives placed pressure on clients to meet costs. If an applicant had sought reinstatement as a remedy and there was a significant delay in the decision being issued,

[221] See Table 5.11 above.

this could have resulted in three possible consequences: financial hardship for the applicant; the position they were seeking reinstatement to may subsequently have been filled; and after a lengthy delay it may have become difficult to re-establish a working relationship with the employer.[222]

Delay in the decision could also have caused considerable uncertainty for both parties as to the outcome of the personal grievance. The employee may have had financial interests in the personal grievance being settled early as well as an emotional interest, while the employer would have experienced uncertainty over the possible organisation of the workplace, possible emotional consequences, and concern as to the financial implications for their business.

As mentioned above, it can be seen that Christchurch had the highest average caseload annually and the shortest average delay between the hearing and the date of decision.[223] These two findings are consistent as a shorter delay between the date of hearing and date of decision may have resulted in the potential for more personal grievances to be heard thus resulting in a higher caseload. The shorter average delay in Christchurch may have been due to the type of occupational classes the parties came from, which could have reduced the complexity of the cases being heard there. As shown in Table 5.5, Christchurch adjudicators heard proportionately fewer white collar claims than Auckland

[222] See above Table 5.37, n 202 and related text for a discussion on the practicalities of immediate reinstatement. Interim reinstatement was also a potential remedy: see *X & Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 and Chapter 2.4.4(e).
[223] See Table 5.12 above and related text.

and Wellington, where the delay was longer in decisions being produced.[224] Hearings in Christchurch also took less time than those in Wellington and Dunedin, which may be indicative of the nature of the claims and consequently the time taken in hearing cases.[225]

Table 5.41: Representation and Average Wait from Grievance to Hearing (Months)

	Advocate	**Counsel**	**Self-rep**	**No Appearance**
Applicant	16.86	16.30	11.87	--
Respondent	16.08	16.40	18.11	15.51

Table 5.41 shows that the quickest way for an applicant to expedite a personal grievance was to represent themselves, although this was not the case for self-represented respondents. An employee who chose to be represented would often have to wait for the advocate/counsel to take action on their behalf, whereas applicants representing themselves may not have experienced such delays.[226] Another contributing factor to the longer delay for those applicants who were represented was the availability of representatives.[227] Some adjudicators took the view that the delays experienced by represented parties could be due to protracted correspondence between representatives as well as contingency representatives[228] delaying the process to increase their fees.[229]

[224] See Table 5.5 above.
[225] See Table 5.38 above.
[226] See Chapters 6.4.10 and 7.5.6 for discussion on time factors. The same thing was found in the Industrial Tribunal in England, that when a person was self-represented they experienced less delay than if they had specialist representation. See Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 201.
[227] See Chapter 6.4.10.
[228] Contingency representatives were those who were paid depending on the outcome of the decision, for example 'no win, no fee', as opposed to representatives who would charge possibly by hourly rate, a charge for a particular type and length of a job, or take a percentage of remedies awarded.
[229] See Chapter 6.4.10.

The most significant delay between the incident causing the personal grievance to the hearing date was for self-represented respondents. The delay for self-represented respondents was on average significantly higher than for self-represented applicants. There may have been several reasons for this disparity, which could have included the unwillingness of respondents to address a personal grievance in the hope that the applicant would abandon the personal grievance, or it could have been that it took a self-represented respondent longer to prepare a response to a personal grievance. This was especially so in dismissal cases where the onus was on the respondent to justify their actions.[230] One adjudicator thought that this onus meant that respondents had a harder task in defending their actions.[231] However, it is evident from Table 4.41 that whether either party was represented by advocate or counsel made little difference to the delays experienced from personal grievance to hearing.

Table 5.42: Representation and Time Lapse from Hearing to Decision (Days)

	Advocate	**Counsel**	**Self-represented**
Applicant	65.92	60.57	29.08
Respondent	66.07	69.55	24.24

Table 5.42 shows that where parties represented themselves, the time lapse was significantly shorter from the date of hearing to the date of decision. This may have been due to counsel and advocates advancing more complex legal arguments. Alternatively, parties may have chosen to represent themselves where the issues were more

[230] See *Wellington Road Transport IUW v Fletcher Construction Ltd* [1983] ACJ 653, *Auckland City Council v Hennessy* [1982] ACJ 699 98 and *Nelson Air Ltd v NZALPA* [1994] 2 ERNZ 665, 668, which all discuss the onus of proof on the respondent employer.
[231] See Chapter 6.4.10 for adjudicator views on time lapse.

straightforward, offsetting the need for professional representation. Using advocates rather than counsel as representatives was linked to a longer average time lapse for the applicant and slightly shorter for the respondent. Again, this may have been due to the complexity of the cases themselves or the legalistic potential of counsel.

5.5 SUMMARY

The data collated and discussed in this chapter has assisted with answering two major questions that are the focus of this research: examining the experiences of participants using the adjudication system and whether or not the process worked for those participants. As can be seen, a number of factors influenced the outcomes and systemic efficiency. In addition, analysis of the 1997 case data raised a number of questions that I put to Employment Tribunal adjudicators including: the affect of party gender, background of adjudicators, hearing location as a variable indicator of outcomes, the wide disparity between remedies sought and remedies granted and the restraint pressure of Employment Court and Court of Appeal precedent decisions on the level adjudicators set remedies at. These are discussed in more depth in Chapter Six, along with the impact of delay in setting up hearings and eventual release of decisions. A further factor discussed at some length was the rarity of applicants seeking reinstatement, which in Chapter Six adjudicators suggested was an option that was often impractical.

The location of the applicant could have caused difficulties if there was not an adjudicator based in that area. In that case it would have been necessary either for the adjudicator to travel or for the personal grievance to be held in one of the main

jurisdictional centres with consequential travel expenses for parties and witnesses. In terms of access to justice, the locality of Employment Tribunal hearing facilities sometimes caused significant problems including financial constraints.[232] It was also found that location of hearings was related to delay in hearings and production of decisions as discussed in Chapter Six. Auckland and Wellington exhibited more delay in hearings and there were also locational variations in remedies granted including level of compensation, quantum of wage recovery actions and cost awards. The impact of the small number of cases in Hamilton and Dunedin makes it difficult to come to clear conclusions.

The workload of adjudicators was also likely to be a matter that had an impact on their availability to hear and resolve personal grievances. Those with a significantly higher workload, it would be assumed, would have taken longer to hear personal grievances and produce decisions. However, objective data obtained while conducting this research regarding the workload of adjudicators has shown that those carrying the heaviest workload often had the shortest hearing times and shortest delays in producing decisions. Consequently, the heavier workload carried by adjudicators did not necessarily delay proceedings.

The background and gender of adjudicators was also analysed to determine whether this had an impact on personal grievance procedure and outcomes. The previous employment background of adjudicators had little impact on the outcome of personal grievances but if

[232] For further discussion on this topic, see Chapter 3.

an adjudicator came from a purely union background, there was a slightly higher likelihood that the applicant would be wholly successful, although the numbers involved were small and this might not hold in a larger study. It was also found that the gender of the adjudicator had little impact on the outcomes of personal grievances, although if a male adjudicator heard the personal grievance there was a slightly higher likelihood of a successful outcome. The background of adjudicators did not impact upon their caseload distribution.

The gender of parties was an issue with males being more likely to pursue personal grievances but conversely female success rate was slightly higher. Males sought higher remedies yet females obtained a higher proportion of remedies sought.

If personal grievances are examined in relation to occupation, the largest single group was made up of employees who occupied positions in the Service and Sales occupational class (25%), which included retail and personal service workers. However, the categorisation of employees using the census data indicated that there was less likelihood of success when employees occupied the Farm and Trade or Professional, Administration and managerial class. The occupational class of employees taking personal grievances did not make a significant difference to the outcome of a personal grievance. This is evident in the similarities between the percentages of individual occupational classes who took personal grievances compared to the percent of the working population which they represented in census data. Clerical employees were an exception to this trend as they tended to be more vulnerable. Some variables in outcomes of compensation and costs awarded were apparent by occupational class. For example, professional, administration

and clerical groups obtained better proportional cost outcomes; having sought much more than other groups these employees received a lesser proportion of compensation that they sought.

The occupational class that had the highest rate of success was the private sector, while public sector employees experienced the lowest rate of success. This shows that the occupational class of applicants could have impacted upon the outcome of personal grievance claims, however the number of identifiable public sector applicants is small and the finding cannot be generalised.

Data from the personal grievance decisions in 1997 showed that direct unjustifiable dismissal claims were the most frequent type of personal grievance adjudicated, followed by unjustifiable constructive dismissal and then unjustified action. Unjustifiable dismissal claims had the highest rate of success, followed closely by unjustified action claims. Unjustifiable constructive dismissal claims had a slightly lower rate of success, which may have been due to the additional evidential burden of proof on applicants in those types of personal grievances.[233] However, due to the small cell sizes of data it was only possible to make a meaningful comparison between direct unjustifiable dismissal claims and all other categories of personal grievances.

The nature of representation each party chose could have had an impact both on costs and the success or otherwise of the outcome. Self-represented applicants tended to fare better and applicants represented by advocates obtained higher success rates than those

[233] See above n 12 and accompanying text.

represented by counsel. Conversely, if the respondent was represented by counsel, the applicant had a lower rate of success and if the respondent was self-represented the applicant had a substantially higher rate of success particularly when the respondent did not attend a hearing. One reason for self-represented applicants having a higher success rate was due to possible assistance from adjudicators and a more lenient approach being taken to strict legal process. Adjudicators' approach to self-representatives and representatives in general is explored more in Chapter Six.

The cost of pursuing a personal grievance, which may escalate with no greater return as hearings are prolonged, was a factor. Hearing length was influenced by occupation variables with administration, professional-associate professionals tending to be involved in lengthier hearings. A disparity between remedies sought and granted was also significant. It is suggested from the information that the wide disparity between remedies sought and granted and costs sought and granted constituted a disincentive or barrier to applicants utilising the personal grievance system. This further relates to the availability of representation and the costs involved in bringing a personal grievance, which in turn may have denied a significant number of applicants access to the personal grievance procedure.[234]

A potentially significant issue with the Employment Tribunal for participants in personal grievances was the delay between the personal grievance and the hearing, and between the hearing and the decision.[235] Objective data obtained from the decisions showed that

[234] This issue is discussed in more detail in Chapters Three and Seven.
[235] See Chapter 7.5.6 and 7.5.8 for a discussion of participants' views on delays in the system.

delays in both categories were substantial. There were various elements that may have contributed to the delays including location of the hearing, workload of adjudicators, complexity of cases and issues of representation. The research therefore showed that delays in the process were a significant problem for participants. Another factor was the variation in the distribution of adjudicator numbers per centre and consequent higher caseload pressures where fewer adjudicators were located.

Clearly, the Government's objectives of making the system quick, easy, and inexpensive were not met. The process itself and adjudicator's views on whether adjudication was an appropriate method to resolve personal grievances and what a suitable alternative could have been will be discussed in Chapter Six.

CHAPTER 6

INDEX OF TABLES

C h a p t e r 6

INTERVIEWS WITH EMPLOYMENT TRIBUNAL ADJUDICATORS

6.1 OVERVIEW

In determining whether or not the personal grievance adjudication system was effective in terms of meeting its statutory objectives it was decided to interview Employment Tribunal Adjudicators to ascertain whether they thought the system worked and what their experiences were using the process. The statutory objectives were: that all employment contracts must contain an effective procedure for the settlement of personal grievances; that personal grievances were to be distinguished from disputes by their subject matter and not by the number of employees involved; that a deliberate lack of co-operation on the part of any person would not be allowed to frustrate the application of a personal grievances procedure; further, the remedy for a proven personal grievance was determined in each case by the circumstances of the case; the personal grievance was an alternative to, and was not in addition to, any right to make a complaint under the *Human Rights Commission Act 1977* or the *Race Relations Act 1971*.[1] As this thesis examines personal grievances that were adjudicated in 1997, only Employment Tribunal adjudicators who were adjudicating in that year were interviewed.[2] Of the 27 adjudicators who were operating in the Tribunal for that year, 21 were available and agreed to be interviewed. Five adjudicators were not available for interview, either due to retirement or emigration; one adjudicator did not agree to be interviewed due to previous negative experiences

[1] *Employment Contracts Act 1991*, s 26.
[2] See Chapter 4.1.2 for a discussion on why 1997 was chosen as a representative year.

from participating in research, and felt that they had moved forward from their days with the Employment Tribunal.[3] Of the six unavailable adjudicators, one from Christchurch had retired, one from Hamilton was unavailable at the time, and of the four from Auckland; one refused to be interviewed due to concerns over confidentiality that arose from an earlier misuse of confidence, and three others were unavailable. From the twenty-one interviews I conducted, two were unusable because of poor tape recording. One of these unusable interviews was repeated. The adjudicator involved in the other unusable interview was from Auckland and was unavailable for re-interview.

The Employment Tribunal had four jurisdictional areas: Auckland, Hamilton, Wellington and Christchurch. Auckland Tribunal adjudicators operated in both the Auckland and Hamilton jurisdictions,[4] and under the Christchurch jurisdiction two adjudicators operated from Dunedin. The interviews for this thesis were conducted in person in Auckland, Wellington and Christchurch. Those adjudicators working from Dunedin were interviewed by telephone, as on the date interviews were scheduled adjudicators were required to participate in a conference at short notice. One Wellington adjudicator was unable to attend an interview in person due to the need for their skills at an emergency mediation, and was therefore also interviewed by telephone.[5] Some Employment Tribunal adjudicators have now been appointed to the Employment Relations Authority; some have been employed by the Mediation

[3] See Chapter 4.3.1.
[4] W R C Gardiner, *The Employment Tribunal (A Report from the Trenches)* 13 May 1998, 4.
[5] For a discussion on how interviews were organised, see Chapter 4.3.

Service; some are now private mediators/consultants; and others have entered private legal practice.[6]

The interviews were conducted in early 2001 and the surveys were conducted in mid 2002. Although the passing of time could possibly have had an impact on the accuracy of the responses through selective recollection, in respect of an inquiry into an individual case, this was not the focus of the interview or the thesis. The general attitudes and impressions of those who had experienced the adjudication process either as applicant, respondent, representative or adjudicator were sought. It was explained to those who used the system in their professional capacity that any survey or interview sought their generalized views of the system and not their perceptions of a particular case. In respect of the parties as 'one shotters', in the terms of Mr. Galanter, the engagement with the tribunal system is more likely than not to have been a significant event in the participants' lives and in consequence, their impressions of the system are unlikely to have significantly diminished.[7] It is to be remembered that the thesis sought to obtain the views of 'X' numbers of advocates, parties, and adjudicators so that any recollection flaws are recollection flaws of the parties as a group and therefore likely to be self cancelling. The use of specific cases from 1997 was merely a methodological device aimed at limiting the number of responses that the thesis would need to deal with, and at the same time ensuring that there was a large enough population from which to draw meaningful samples of settled cases.

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[6] This information was obtained from personal knowledge of the employment adjudicators, telephone discussions with the Employment Relations Authority and previous Employment Tribunal members and email contact with Employment Tribunal adjudicators.

[7] Mark Galanter 'Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95–160.

This chapter details interviews with adjudicators and discusses various findings drawn from the research within this group. These findings include both common themes and contrasting opinions; they also identify particular problem areas, elements of the process that worked, and ideas for future alternatives for effective resolution of personal grievances.

The use of tables, which appear to present qualitative data in a quantitative form, was carried out as it was often the clearest way to present a range of answers and there was little or no doubt from the responses as to what the responses were.

Tapes of interviews with Employment Tribunal Adjudicators were retained in the office of the author in the School of Law, University of Canterbury. Tapes, electronic versions and paper transcriptions of interviews have subsequently been moved to the author's residence.

6.2 VALUE OF INTERVIEWING ADJUDICATORS

One of the best ways of determining whether a process worked effectively was to seek the views of those who worked within that system. Within the boundaries of legal requirements, adjudicators themselves had control over the hearings and therefore considerable impact on whether the hearing process was effective. They could also have had an influence on the effectiveness of representation, depending on whether they were prepared to assist inexperienced or incompetent representatives, or parties who chose to represent themselves. Adjudicators were, to a certain extent, able to influence how the hearings were conducted and in consequence the prevailing

atmosphere of the Tribunal.[8] This influence could have affected the process by making it less, or more, intimidating for the participating parties, or by taking into account any special requirements the parties may have had. Although adjudicators were not responsible for any delays between the date of the personal grievance and the date of the hearing, some responsibility for any delays that occurred between the date of hearing and the date of decision being produced may have been attributable to this professional group; it must be noted that any delay of this nature may well have been influenced by other factors such as the workload of the adjudicators. These factors have been discussed in more detail below.[9] As a result of their position and in particular for the reasons just laid out, the opinions of adjudicators were of value in determining whether the personal grievance procedure was both effective in respect of, and sensitive to, the participants' needs. Further, there exists a distinct possibility that the attitudes and perceptions of adjudicators could have had either a positive or negative impact on the process and therefore the parties' experience of it. Also worthy of investigation, was whether the attitudes of adjudicators towards the adjudication process had changed either during their tenure or in hindsight.

Although previous researchers in New Zealand have examined and analysed outcomes of the personal grievance and bargaining processes, no previous research has been done by interviewing Tribunal Adjudicators and seeking their views on whether the system worked.[10] As the primary focus of the thesis was to examine

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[8] See *Employment Tribunal Regulations 1991*, r 49, for details on how the Tribunal was usually to proceed. Also see Chapter 2.4.3(c) for discussions on the case law affecting hearing procedures and the influencing of Tribunal procedures.

[9] See Chapter 6.4.10 for discussion on reasons for time lapses.

[10] See, for example, McAndrew I, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Dismissal for Misconduct' (2000) 25 NZJIR 303; Gardiner R, 'Personal Grievance Mediation in the Employment Tribunal' (1993) 18 NZIL 342; Harbridge R and Hince K, 'The Employment Contracts Act: An Interim Assessment' (1994) 19 NZJIL 235. In comparison views of Industrial Tribunal

peoples' experiences using the personal grievance adjudication system, it was thought essential to consider the views and experiences of all participants. Therefore, it was necessary to seek input from adjudicators and not just from parties and representatives.

6.3 QUESTIONS FOR EMPLOYMENT TRIBUNAL ADJUDICATORS

Questions for interviews were divided into five separate categories: process; types of action; parties; representation; and costs.[11] The questions were devised from issues that arose from information obtained from the database,[12] as well as background information discussed in Chapter Two.[13]

6.3.1 PROCESS

The first category, process, relates to the adjudication procedure. This category was intended to discern whether the process itself was effective, what the attitudes of adjudicators were towards it, and whether adjudicators believed that the procedure met statutory intentions.[14] Unknown to the author at the time of devising the interview questions, some of the questions in this category related to administrative procedure and as such were matters that were usually dealt with by administration staff rather than adjudicators. Consequently, adjudicators were unable to answer questions of this type. One purpose of the enquiry was to determine whether administrative matters

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Members (both chairpersons and lay members) in England were sought by postal questionnaire, but interviews with members were not conducted, although interviews were conducted with applicants and respondents. See L Dickens, M Jones, B Weekes and M Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (1985) 26.

[11] See Appendix IV.

[12] See Chapter 4.4.

[13] See Chapter 2.2.

[14] See Appendix IV, Process.

occupied a significant proportion of an adjudicators' time. Of further interest, as noted earlier in the introduction to this chapter, in this process category were issues relating to workload and whether this contributed to delays in the procedure.

6.3.2 Types of Personal Grievances

The second category dealt with types of personal grievances. This included whether the type of personal grievance affected the adjudicators' hearing of the case, whether they took a more sensitive approach to sexual harassment claims, and whether adjudicators would make recommendations in an attempt to ensure employers were proactive in improving practices and attitudes toward sexual harassment.

6.3.3 Parties

The third category of questions related to parties, and whether certain characteristics of parties affected the adjudicators' approach. Possible characteristics that might have affected adjudicators' attitudes were: occupation, gender, social status, ethnicity and disability. Other issues that were of interest in relation to parties were a possible power imbalance between employer and employee, instances where there were multiple applicants, and frequent appearances by particular parties.[15]

6.3.4 Representation

Questions about representation were the fourth category. These questions related to varying standards of representation, what the attitudes of adjudicators were to poor representation and if representation assisted, how it did so. Adjudicators were also asked about the standard of self-representation and whether they made special attempts to assist parties who represented themselves. Ideas were sought from

[15] See Appendix IV, Parties.

adjudicators as to how the standard of representation could have been improved. Whether poor presentation standards affected adjudicators' attitudes to claims, or a party's defence, was also investigated.[16]

6.3.5 COSTS

An important consideration in assessing access to the personal grievance process was the cost of bringing a claim. Therefore, the fifth category of questions related to costs. In this instance, costs[17] could have included the cost of lodging a personal grievance, the parties' own representation costs, and costs that may have been awarded against the parties. Adjudicators were asked what factors they took into account when awarding costs and how they determined whether expenses claimed were necessarily and reasonably incurred. To determine whether costs were prohibitive, adjudicators were also asked about legal aid and the principle that self-representatives could not claim for the cost of their time.[18] Other issues raised were: claims without merit, executive time (which meant the time of a staff member employed to undertake this sort of representation) for example an in house counsel, frivolous and trivial claims, and out of time applications. Adjudicators were also asked a general question as to whether or not they believed that the level of costs incurred in bringing a personal grievance was a barrier to accessing the procedure.

6.3.6 GENERAL OPINION

Finally, adjudicators were asked whether they had any general comments to make regarding the Employment Tribunal and its procedure. Some of the responses to this question actually related to earlier questions in the interview. If this was the case the

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[16] See Appendix IV, Representation.
[17] *Employment Contracts Act*, s 98 stated that the Employment Tribunal had the authority to award costs.
[18] See Appendix 1, Costs.

answers have been transferred back as a response to the relevant question and comments which have been of a general nature have been left at the end of the survey as originally intended. The responses to some questions relate to the establishment of the Employment Relations Authority in 2000[19] and are therefore discussed in Chapter Eight.

6.4 CATEGORY 1: PROCESS

6.4.1 NATURE OF THE ADJUDICATION PROCESS

One of the main issues relating to the operation of the Employment Tribunal was the process itself. Did it facilitate the goal of the legislation to introduce a system that was quick, cheap, easy and straightforward? It was decided to examine the adjudicators' views on the actual process to glean from them whether they perceived that the intentions of the legislation had been met or whether procedural deficiencies defeated those goals. During the time in which the Employment Tribunal was operating much criticism relating to the nature of the procedure that the Tribunal was using occurred, the emphasis being that the process was itself a barrier to access.[20] One issue was whether the procedure itself intimidated parties who wished to use the personal grievance process. In some instances, adjudication was the only available option to employees seeking to resolve personal grievances, as mediation was not compulsory under the *Employment Contracts Act 1991*.[21] In other words, one party may have wished a personal grievance to be resolved in a less formal mediation framework but

[19] *Employment Relations Act 2000*, s 156.
[20] See G Anderson, 'There Must be a Better Way: Alternative Dispute Resolution' (1997) 2 ELB 2; P Roth, 'The Grievance Procedure' in J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.16.
[21] *Employment Contracts Act 1991*, s 78.

the other party was not obliged to agree to or participate in mediation, thus leaving adjudication as the only available method of resolution.

Adjudicators were asked to describe the personal grievance adjudication process, and whether they considered it was formal, informal or legalistic.[22] Of the 21 adjudicators interviewed, 11 thought that the adjudication process was formal, while one thought it was informal. Seven adjudicators thought that the process was somewhere in between formal and informal, depending on what you were comparing the process to, such as the formal process operating in the Employment Court or the less formal conciliation process under the *Labour Relations Act 1987*.[23] One adjudicator thought that the increased formality came hand in hand with the expanded jurisdiction of the personal grievance mechanism, and one adjudicator's response was not recorded due to technical difficulties.[24]

Of the 20 responses received from adjudicators, four specifically stated that the process was more formal than it should have been. This was due to such factors as the influence of lawyers, court procedure and direction, and the wording of the legislation.

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[22] In B Garner, *A Dictionary of Modern Legal Usage* (2nd ed, 1995) legalistic was defined as 'a rather contemptuous term meaning "formalistic; exalting the important of formulated rules in any department of action."' In R Ryan and P Walsh, 'Common Law v Labour Law: The New Zealand Debate' (1993) *Australian Journal of Labour Law* 230,246, it was argued that informal meant, amongst other things, less reliance on formal procedures and a more investigative approach with less reliance on lawyers and a reduction in the cost of representation. Whilst not defining legalism per se, this discussion focussed on the meaning of informal, which to some extent is almost the opposite approach to that of legalism.
[23] Part IX of the *Labour Relations Act 1987*. See Chapter 2.2.2.
[24] See Chapter 4.3.2(d).

Twelve adjudicators mentioned that the adjudication process was legalistic. Of those 12 adjudicators, eight had also stated that the process was formal, while four had said it was between formal and informal.

Adjudicators commented on the formality of the Employment Tribunal as follows:

> The processes were good, but not sufficiently resourced so speediness was defeated and the Court imposed excessive rules so informality suffered.
>
> The Employment Court and representatives made the process too legalistic and often representatives were not available. The statutory objectives were defeated by the Employment Court. If you "upped" the resources for the Tribunal you would have had a system that worked as well as the Employment Relations Authority or the Mediation Service. There was nothing wrong with the system as it was designed. The Tribunal could have taken a more interventionist role like the Employment Relations Authority if it were not overly legalistic with supervisory judgments from the Court.
>
> The Tribunal should have had more direct involvement in administration. The Tribunal would have worked better if not tied up by Employment Court rules, regulations and procedures. The legalistic approach and overly academic approach to Employment Law has affected the way in which the Employment Tribunal was both perceived and how it worked.

The intentions of the *Employment Contracts Act 1991* were that the process be 'quick, informal and inexpensive.'[25] Adjudicators were asked whether they believed that these intentions had been met. They responded as follows:

Table 6.1: Have the Intentions of the ECA Been Met?

Adjudicator Response	**Result (N=20)**
Yes	0
No	15
Not Entirely	5

The views of one adjudicator were not recorded due to technical problems, and are not included in the majority of the following tables. However, Table 6.1 shows that three-quarters of the adjudicators thought that the intentions of the *Employment*

[25] [1991] 524 NZPD 1437.

Contracts Act 1991 had not been met, whilst the remainder believed that the Government's intentions had been partially met. No adjudicator took the view that the principles of speediness, informality and affordability, which were intended by the Government, had been entirely met.[26] One commentator suggested that the personal grievance procedure itself was more accessible than prior to the *Employment Contracts Act 1991*,[27] but resolution of personal grievance complaints was not as expeditious as the Minister of Labour had intended at the time the Bill was introduced.[28]

Adjudicators commented on this question as follows:

> The Tribunal did not meet statutory objectives – it was not quick easy or inexpensive. The Employment Court was to blame because it set standards too high and moulded the Tribunal in its own image. The Court made the Tribunal too legalistic and Tribunal adjudicators did not resist enough.
>
> Although the procedures seemed reasonably rigid, it still had enough flexibility for people to be treated fairly. The [Employment Relations Authority] is not operating much differently from the Tribunal.
>
> The Court treated the Tribunal like any other Tribunal when legislation dictated that it was to be quick, informal and inexpensive. The Tribunal came to be dominated by the legal profession. If the Tribunal had been brave enough to embrace the approach taken by the Mediation Service and Conciliation Service, which the ERA is now reverting to, it would have been a more effective body. The Court had a group of excessive legalists within the Tribunal [who] were responsible for the Tribunal being compromised by delays.
>
> Some of the operation matters became too formalised. The Court administered/managed the Tribunal by way of review and not appeal. The Court created legal complexity that surrounded the process. Procedures on filing were too legalistic, there were mechanisms for raising fees for law firms and it became too slow which was a resourcing issue.

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[26] For a discussion of the principles behind the *Employment Contracts Act 1991*, the development of the Employment Tribunal Procedure and the Legislative intentions, see Chapter 2.3.1.
[27] P Roth, in J Hughes, P Roth, G Anderson (eds) *Personal Grievances* (1999) 2.16.
[28] (1991) 514 NZPD 1437. W F Birch, Report Back Speech Notes – Press Release, 22 April 1991. See Chapter 2.3.1.

6.4.2 ADMINISTRATIVE QUESTIONS

Questions 1.3 to 1.7 were of an administrative nature, for example, incorrect documents being filed, insufficient information in statements, non completion of forms and instances where adjudicators were required to make a direction for a statement of defence to be filed. It had not been clear where the responsibility lay in dealing with incorrect documents, incorrect statements of claim, intention to defend and direction as to statement of defence matters. The reason for asking these administrative questions was that they contained an element of legal obligation and it was unclear whether adjudicators or administrative staff had responsibility to ensure they were met. It may have been that adjudicator's time was being used unnecessarily in resolving these matters and may have resulted in delays in the process.

On answering these questions, most adjudicators advised that they should be addressed to administration staff, as this was generally their responsibility. It was therefore not necessary to discuss these matters with administrative staff, as the answers to the specific questions were not the issue – the issue was how much of adjudicators' time was being absorbed in conducting these functions.[29]

6.4.3 WITNESSES

Another factor that had the potential to affect the use of time and therefore the cost of the adjudication hearing was whether either party called insufficient or irrelevant witnesses. This situation may have arisen where either of the parties failed to call necessary witnesses, or called irrelevant witnesses. Under ss 96 and 126 of the *Employment Contracts Act 1991*, either party to a personal grievance could apply to

[29] For an outline of procedural requirements, see Chapter 2.4.

summons witnesses to give evidence before the Tribunal. All adjudicators interviewed had experience of insufficient and irrelevant witnesses being called in adjudication. Adjudicators made a number of general comments regarding the calling of insufficient and irrelevant witnesses including the following:

> I would say on a percentage basis more than 50 percent, no it would be higher than that, called either irrelevant witnesses or insufficient witnesses. But more irrelevant witnesses, and why was that? Because if they didn't get it all on record at that point, they couldn't introduce new witnesses at the next step, they'd have to seek leave of the court. So they brought in everything but the kitchen sink, and as a result, managed to lengthen the hearing, the cost of it, and everything else. It was a fault of the process.[30]
>
> [Q]uite often it was legal counsel who should know better, making a meal of the case, trying to make something out of nothing, with volumes of evidence that were so peripheral to the case that it would drive you bonkers.
>
> Particularly if the hearing is say two years later, they might have not been able to get supporting evidence… or they want to keep costs down… [so] they don't bring sufficient witnesses.

Of note from this adjudicator's comments, is that when insufficient witnesses were called this may have been in an effort to constrain proceedings and consequently reduce costs on the parties. On the other hand, a protracted hearing would have been likely to result in substantially higher costs.[31] Regarding irrelevant witnesses, adjudicators commented that often everything and everyone possible was dragged into the procedure. This may have been due to the fact that, at that time, there was no *de novo* hearing on appeal so every possible option or argument had to be included at the Tribunal hearing stage.[32]

Another issue identified by adjudicators above was that after considerable delay in the case being heard it may not have been possible to obtain sufficient witnesses to support the claim or provide evidence of the personal grievance or its defence. It was

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[30] There was no *de novo* hearing and therefore new evidence could generally not be brought on appeal. *Employment Contracts Act 1991*, s 95.
[31] See para 6.8.3. In determining the level of costs the Tribunal took into account the length of the hearing and preparation time. See Chapter 5.4.7.
[32] See *Employment Contracts Act 1991*, s 104, which proscribed the Employment Court's jurisdiction.

also possible that memories of events may have faded, or that either parties or witnesses may have moved, making witnesses difficult to locate, which could have impacted on parties' ability to support their claims or defences. As shown at Table 5.37, the delay between the event precipitating the personal grievance and the actual hearing was often considerable. Therefore, access to relevant and sufficient witnesses could have been a substantial difficulty. As shown in Chapter Five, long delays occurred frequently.[33]

A further issue was whether allowances payable to witnesses were adequate, making it possible for them to participate freely in the process. Arising from this question was whether the level of allowances deterred witnesses from appearing without being summonsed. Witness allowances and expenses were payable under Regulations 45 and 46 of the *Employment Tribunal Regulations 1991*, which in turn referred to the *District Courts Act 1947* and subsequent District Court Rules, which stipulated that witness allowances and expenses were payable under the *Witnesses' and Interpreters' Fees Regulations 1974*. The schedule to the Regulations provided that the rate payable to witnesses for up to three hours absence from their normal place of work or residence was $25.00, and for a period of absence exceeding three hours was $50.00.[34] If the witness would suffer a loss of earnings due to time spent travelling from the usual place of work or residence to the courthouse for the purpose of giving evidence, then that time could be counted as if it were time spent at the hearing.[35] According to the Minimum Wage Order 1997, the minimum wage payable to youth workers (that was those under 20 years of age) in 1997 was $4.20 per hour, and the

[33] See Chapter 5.4.9.
[34] *Witnesses' and Interpreters' Fees Regulations 1974*, sch 7, cl 3.
[35] Ibid, sch 7, cl 4.

minimum wage payable to adult workers (i.e. those over 20 years of age) was $7.00 per hour.[36] Therefore, the allowance payable to adult witnesses was only slightly higher than the minimum wage, at $8.33 per hour.

Witness allowances and expenses were paid by the party requiring the witness to appear. Travel expenses and meal allowances were paid at the time of the witness summons, while witness fees were paid after the hearing depending on how long the witness was required. Witness allowances and expenses could then be claimed as costs and disbursements.[37] It may have been that parties to personal grievances were unwilling to call particular witnesses as the party who was not awarded costs and disbursements bore the cost of witness expenses and attendance fees; this could have caused injustice where costs were allowed to lie where they fell.

Table 6.2: Did the Allowances and Expenses Payable to Witnesses Adequately Reimburse Expenses Incurred?

Adjudicators Response	**Rate (N=20)**
Yes	1
No	13
Don't Know[38]	6

Table 6.2 shows that a clear majority of adjudicators thought that the level of allowances and expenses did not adequately reimburse witnesses.

[36] Minimum Wage Order 1997, clauses 2 and 3.
[37] Personal correspondence with Deborah Downie, Secretary of the Employment Tribunal, 28 January 2005.
[38] As above, one response was not recorded.

Table 6.3: Were the Level of Allowances/Expenses a Deterrent for Witnesses Appearing at Tribunal Hearings Without Being Summonsed?

Adjudicators Response	**Rate (N=20)**
Yes	2
No	13
Don't Know[39]	5

In contrast, Table 6.3 shows that adjudicators – despite their views in Table 6.2 – believed that the level of allowances and expenses paid to witnesses was not a deterrent for witnesses to attend adjudication without being summonsed. This begs the question: if the level of allowances and expenses payable to witnesses was not sufficient, why were the rates of allowances payable to witnesses not a deterrent to them appearing? It is only possible to surmise the answer to this question but it may have been that witnesses were keen to see justice being done; they may have had some level of dissatisfaction with either the relevant supervisor or employer; they may have felt under an obligation to appear; or they simply may not have been concerned about the rate payable.

6.4.4 PRESENTATION OF EVIDENCE BY PARTIES

As discussed in Chapter Two, the *Employment Tribunal Regulations 1991* provided for how evidence was to be adduced in adjudication, and the process for examination and cross examination of witnesses.[40] Regulation 49 provided that each party or witness could give his or her evidence-in-chief by reading or confirming a written brief or statement of evidence. Adjudicators were asked whether parties in adjudication hearings ever experienced difficulties in presenting evidence-in-chief and whether parties usually used written statements as guidelines. The purpose of this

[39] As above, one response was not recorded.
[40] *Employment Tribunal Regulations 1991*, reg 49. See also Chapter 2.4.3–2.4.3(a).

approach was to gauge whether the adjudicators displayed a level of understanding of non-formal approaches and could adjust their processes and decision-making to accommodate differences and allow parties to present evidence in the most appropriate manner commensurate with individuals' backgrounds and abilities. This was particularly important in situations where parties were self represented and had evident difficulties understanding formal adjudication process. This required, at times, adjudicators to go beyond the basic requirements of their role and use a more enabling approach. All adjudicators said that parties to adjudication used written statements of evidence and some said that this was especially prevalent among parties represented by lawyers. One adjudicator also stated that the Tribunal encouraged parties to use written statements of evidence. Some adjudicators said that it was only self-representatives who did not always use written statements of evidence as they were unaware of the process.[41]

The responses from adjudicators were mixed as to whether parties in adjudication hearings experienced difficulties in presenting their evidence-in-chief. Some difficulties acknowledged by adjudicators were: people could be overcome with emotion; reading and language difficulties; difficulty in understanding words where a brief is written by lawyers; translation; cultural differences, for example sitting down in the witness box; and sickness or disability. When discussing these matters adjudicators commented as follows:

> For example parties get overcome by emotion and can't proceed and sort of break down and we have to take a break. Other people obviously have reading or language difficulties. Others are perhaps a little bit frightened or intimidated by the process and are very nervous.

[41] For adjudicators' comments on assisting self-representatives see para 6.4.5

> Often the brief's been written by the lawyer with these wonderful words and things, and when they got to read it, and they can hardly read, and they certainly don't understand the words that they are saying.
>
> They may look shifty and all that and dishonest, or they may just be absolutely bloody terrified. And it's hard to know.
>
> Very occasionally counsel will seek permission to read out their briefs of evidence where people do have reading difficulties.
>
> But the quality of presentation and the quality of their evidence can often be poor. So while they can get it across, they can be rambling all over the place, there can be lots of irrelevancies and stuff like that.
>
> You'd be surprised at the number of people, some of whom are verbally very fluent, who can't read very well.
>
> If it's written, you can simply ask them to affirm, and they simply affirm that the evidence in chief is the evidence they want to give and you move on to cross-examination or you can get the lawyer or advocate to read it for them.
>
> Obviously people vary a lot in terms of confidence. Taking the witness stand is a very scary thing for anybody, some people are more confident than others…I even gave him a break and said "go out and have a cup of tea and then come back" but he still couldn't.

Two adjudicators commented that they could vary the procedure if difficulties in presentation of evidence occurred while others stated that they encouraged participants to simply 'tell their story'. Tribunal Adjudicators had the authority to alter or vary the procedure for conducting the hearing, provided any alteration was conducted in a fair manner,[42] as well as the authority to question witnesses provided it was done fairly.[43]

6.4.5 Self Representatives

As parties could represent themselves at adjudication, a possible issue was whether self-represented parties experienced particular difficulties at hearings. It has already been noted that some self-representatives were unaware of the process and did not know that they could use written briefs or statements of evidence. Adjudicators were asked if self-representatives had particular difficulties with presenting evidence and

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[42] *Employment Tribunal Regulations 1991*, SR 1991/227/49(2). *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819, 838.

[43] *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819, 838. See Chapter 2.4.3(c) for some discussion on the role of adjudicators and varying procedures.

examining witnesses, and if the answer to the above question was yes, how did they assist? All 20 adjudicators stated that self-representatives had difficulties, and one adjudicator was not recorded. Of the 20 adjudicators' responses recorded, 13 stated that there were special difficulties with cross examination, three identified examination of witnesses in general as a difficulty, and seven mentioned problems relating to evidence. All 20 adjudicators recorded said that they would assist self-representatives in some way, including:[44]

- Explaining the procedure;
- Explaining cross examination and evidence;
- Summarising evidence;
- Swearing parties in and letting them talk;
- Asking questions;[45]
- Adapting the procedure;
- Discouraging a legalistic approach;
- Providing encouragement and guidance;
- Handing out Regulation 49, which detailed the procedure of the Employment Tribunal.

Goddard CJ commented in *Davidson v Telecom Central Limited*[46] that adjudicators had to be detached to present a picture of even-handedness, and should not question witnesses to satisfy their curiosity as to their credibility.[47] Although self-represented parties may not have been aware of their right to use written briefs or statements of evidence, the Court clearly indicated that adjudicators should not take over the role of questioning witnesses, and generally should not become closely involved in the presentation of evidence. However, one adjudicator remarked in response to Goddard CJ's guidelines that:

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[44] *Employment Tribunal Regulations 1991*.
[45] See Chapter 2.4.3(c) for a discussion of adjudication procedure and role of the adjudicator in asking questions.
[46] [1993] 2 ERNZ 819, 838.
[47] Ibid. See also Chapter 2.4.3(c).

> I tried always in my own cases to strike a balance between assisting the party to get their story across to make the points they needed to make in cross-examination, without giving them such assistance as to make their case to the detriment of the other party…[w]e had to help with the process as much as possible, but we couldn't put words in their mouth…[s]o sometimes you have to go far enough to ask questions to get the job done, but I've tried not to go so far as to make the case for the person whose presentation is deficient.

The types of assistance provided by adjudicators to self-representatives suggest that the procedure itself may have been intimidating to users, or was at least perceived to be, thus making the process less accessible to self-represented parties. The procedure to be followed in the adjudication hearing was contained in Regulation 49 of the *Employment Tribunal Regulations 1991*.[48] This regulation provided the order in which steps of the adjudication process were to be followed and what was required by parties in terms of the presentation of evidence and examination and cross-examination.[49] As can be seen from Regulation 49, the legal requirements for participating in adjudication were comprehensive, and it is therefore possible that self-representatives were unaware of, or unable to understand, what was required of them under the Regulations. The reason why some parties chose to represent themselves may have related to financial constraints or because they were not represented by unions who may have provided representation free of charge to members.[50]

6.4.6 Unseen Material and Wrong Legislation

As there were certain stipulated legal requirements and procedures that had to be followed prior to, during and after the adjudication hearing, it was conceivable that parties may have been unaware of the requirements contained in the *Employment Tribunal Regulations 1991*. Likewise, representatives may have been unfamiliar with

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[48] For information on application to the Employment Tribunal or making a response to a claim of personal grievance, and the procedures to be followed at adjudication, see Appendix II.
[49] See Chapter 2.4.3(c).
[50] See Chapter 5.4.3 for a discussion on the provision of legal representation and assistance by State and Private Sector Unions.

steps to be followed under the legislation. Adjudicators were thus asked how they responded if unseen material, which should have been disclosed at discovery but had not been, was introduced by the respondent at the hearing. Fourteen adjudicators said that they would have allowed the applicant to take an adjournment. In addition, seven adjudicators said that they would allow the applicant to recall and examine witnesses if needed.

If representatives brought cases under the wrong legislation, adjudicators were asked what approach they took to remedy the situation. Adjudicators made the following comments: the situation would be remedied via costs; an application to strike out would have been invited; or the defect could be amended under s 140.[51] If it was the wrong part of the legislation or the wrong section, you could give the opportunity to amend or use s 34 to amend.[52] An alternative view was that this was an administrative function dealt with by appropriate staff, or the problem could have been sorted at mediation. If there was disagreement between the parties regarding an amendment, it was discussed with them and mediated if necessary. If there was no legal jurisdiction, the Tribunal could not have heard the case, for example if a claim was brought under the wrong legislation. In Wellington, adjudicators advised that they took a case management approach, so those types of issues were identified and resolved early. Whilst identifying the issues of concern, some adjudicators believed that it was also important to assist representatives in maintaining dignity despite the error. In Auckland, two adjudicators advised that in those circumstances the case would have

[51] *Employment Contracts Act 1991*.
[52] Ibid, s 34, gave the adjudicator authority to find that a personal grievance was of a type other than that which had been alleged. It was not intended that this section be used by the parties to correct an error in the use of an incorrect section or piece of legislation. It provided some ability for adjudicators if the personal grievance had been of the wrong type. See Chapter 2.3.3 for a brief discussion of s 34 of the *Employment Contracts Act 1991*.

failed or it would have sounded in costs. Three Auckland adjudicators advised that they had no experience of cases having being brought under the wrong legislation. A further Auckland adjudicator said they had taken no action. One Auckland adjudicator advised that they had taken a similar approach to Wellington adjudicators; the 'case management' approach, and another stated that they would amend the case appropriately. One Wellington adjudicator advised that they would correct the error and another commented that they had no experience of this issue. In Christchurch, one adjudicator advised that there was no issue, a second advised that they would amend the Statement of Claim, with a third adjudicator stating that the case would have failed. In Dunedin two adjudicators advised respectively that they had no experience of incorrect legislation having being used, and the second stated that the legal representatives would have been sent off to amend the statements appropriately.

Adjudicators' comments emphasise that despite sometimes fairly significant errors and potential for delay, they were prepared to use a variety of strategies and a flexible approach to remedy procedural irregularities with an overall goal of allowing parties to present their case with a minimum of legal straitjacketing. For example, the case management approach in Wellington prevented many problems arising and may have meant that such issues did not reach adjudication. In this respect, it could be inferred that the approach of the adjudicators assisted in implementing the Government's intention of making the procedure easy to follow.[53]

6.4.7 Representatives and Parties

If representatives were inadequate in their method of examining or cross-examining witnesses, it was important to assess whether adjudicators assisted. Adjudicators

[53] [1991] 524 NZPD 1437.

responded in general terms that they would talk to representatives about their method or technique, and ask questions where critical information was left out. In particular, seven adjudicators said that they would not interfere with the examination process, but would interfere at the end if issues remained outstanding. Four adjudicators advised they were prepared to assist self-representatives. Three adjudicators indicated that they would become involved in the examination process if necessary to clarify circumstances and issues. Three adjudicators advised that they would not interfere with the process unless a failure to intervene could have resulted in an injustice. If a lack of such intervention would have caused some delay, one adjudicator advised that they would become involved. The same adjudicator believed that problems with the approach taken by the representatives were the responsibility of the party concerned. Another adjudicator indicated that when there were difficulties with lay people making statements instead of asking questions, the adjudicator said they would assist with the formation of appropriate questions. Another adjudicator advised that they would not help with examination questions, but would assist on issues relating to remedies. Another adjudicator indicated that if complex questions were involved they would assist and would steer the parties back to the relevant issues, if they had strayed from the issues in question. Only one adjudicator advised that they would not assist in any circumstances. One adjudicator believed that it was their function to 'find the truth' and would therefore become involved with the process, with another adjudicator saying that they would 'wade in'.

In detail, adjudicators made the following comments when discussing inadequate representation. One adjudicator commented that:

> [A] party is responsible for the representative that they engage. They're paying them fees and if they don't get adequate representation then that's their problem with that representative.

Similarly, another adjudicator stated that 'if people have got bad representatives that's their bad luck.' In contrast, it was observed by another adjudicator that:

> [the issue of inadequate representation] is a tricky one because the Court's directions are quite clear that as adjudicators we're supposed to be hands off. It's for the parties to conduct their own case and how they are going to present it. If on the other hand I'm conscious that important issues need to be brought out then rather than ask them to ask it, I will ask those questions myself…but again, I was conscious as a Tribunal Member of the restrictions on the degree of intervention that the adjudicator has.

This attitude was shared by another adjudicator who commented that:

> [P]robably the biggest bugbear in the Tribunal that causes the greatest angst to parties, adjudicators and everybody else was how far did you go, where cross-examination was inadequate, in getting to the truth of the thing…[t]he difficulty was that you were charged with making a decision and you needed to know as much as you could about the things that were really relevant and upon which the decision rested so that obviously the huge temptation was there to ask the questions to get the information you needed from the witnesses. It's the universal dilemma… I took the view that my job was to find the truth and to try and make a decision based on the facts and that I was going to find the facts regardless. But I'd be lying if I didn't say that I knew that caused problems from time to time and made some people very unhappy. And I understood why. It was a very, very difficult issue.

These comments from adjudicators illustrate the difficulties faced when using the adjudication procedure stipulated by the *Employment Contracts Act 1991*. In comparison, the conciliation system used to resolve personal grievances under the *Labour Relations Act 1987* was much less formal; likewise the procedure used under the *Employment Relations Act 2000*, now in operation, is much less prescriptive.[54]

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[54] *Labour Relations Act 1987*, Part IX; *Employment Relations Act 2000*, Part 9. This can also be contrasted with Industrial Tribunal system in England. Generally, members of the Industrial Tribunal did not intervene where parties were legally represented. However, where parties were unrepresented and were experiencing difficulty in presenting their case the chairperson was more likely to participate. The *Industrial Tribunals (Rules of Procedure) Regulations 1980* stated that the Tribunal: "shall so far as it appears to be appropriate seek to avoid formality in its proceedings and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law." One-time President of Industrial Tribunals, Sir Diarmaid Conroy, has also commented that:

> The tribunals are meant to provide simple informal justice in an atmosphere in which the ordinary man [sic] feels he is at home…an atmosphere which does not shut out the ordinary man so that he is prepared to conduct his own case before them with a reasonable prospect of success.

See Conroy, Diarmaid, 1971a 'Do Applicants Need Advice or Representation?', *The Future of Administrative Tribunals.* Edited transcript of proceedings of a conference held at Institute of Judicial

The danger was – according to adjudicators – that in some instances, issues were missed due to the formality and complexity of the system, and the fact that the process was adversarial. Therefore, the issues of formality and standard of representation in an adversarial system are inevitably linked. This approach appears to conflict with the general principle that the best way to obtain accuracy of disputed facts was through cross examination.[55] However, in the case of the *Employment Contracts Act 1991* Parliament intended to make the procedure quick, inexpensive and informal, so the general legal principle was being set aside to expedite resolution of personal grievances.[56]

Comments by adjudicators emphasised that there was some confusion over the role of adjudicators as decisions of the courts were inconsistent. One adjudicator said that they would just 'wade in' in adjudication, while at least two adjudicators said that they would not assist because that was not the role of the Tribunal. One adjudicator noted that on this issue the approach varied from adjudicator to adjudicator.

Due to the nature and character of personal grievances, it was possible that adjudicators may have encountered hostile parties, witnesses or representatives to a personal grievance. Adjudicators were asked how they dealt with hostile parties to a personal grievance, including parties, witnesses or representatives. Suggestions that adjudicators had for dealing with hostile parties were:

Administration, University of Birmingham, April 1971, Birmingham: Institute of Judicial Administration. See also Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 73–74.

[55] In *Browne v Dunn* (1893) 6 R 67 (HL), it was held that if the court was to disbelieve one witness then the court should have the opportunity to cross-examine the witness. Cross examination is intended to allow the witness to explain the relevant evidence. The rule was to ensure coherence of evidence before the court. The *High Court Rules* provide that if a witness is to be disbelieved, the witness should be cross-examined (r 441K). I McIntosh (ed), *McGechan on Procedure* (loose-leaf, 2005), HR441K.

[56] WF Birch, Report Back Speech Notes – Press Release 22 April 1991.

- Staying calm and telling the hostile party that they were not helping themselves;
- Explaining the role of the Tribunal;
- Threatening an exclusion;
- Making the process transparent and fair;
- Taking an adjournment;
- Applying the case management approach to iron out problems;
- Restoring formality;
- Talking to representatives out the back;
- Instructing witnesses that they must answer questions; and
- Advising parties that if they do not like the ruling, they can appeal.

Adjudicators were asked whether they had ever experienced any adverse reactions to their decisions by either parties or their representatives. Not many adjudicators said that they gave oral decisions, and if they did, adverse reactions sometimes occurred. Some examples of how parties have reacted to decisions of adjudicators follow. However, it was not always clear whether or not adjudicators were referring to oral decisions or written ones:

> I don't, haven't tended to give oral decisions anyway, so I haven't been able to sit there and watch the faces drop and the swear words come out and the stormings out of the room.
>
> But I have had people contact me outside later, or take offence to a decision, write me long and nasty letters about how come I saw it this way or that way or whatever. And there's always the problem of leaning over in the supermarket and getting stuff out of the freezer and looking up and there's the person who was on the other side.
>
> I don't deliver oral decisions where there is animosity or hostility in the room, simply to avoid exacerbating that hostility further. I'd rather reserve a judgment and give it to them in two days time or a days time when they've got away from the place rather than the parties confronting each other or worse confronting me and showing contempt to the institution.
>
> …the Respondent was a very volatile person and she jumped up and started screaming and yelling and carrying on, and I remember another time bumping into somebody who was quite a senior manager in a company that had lost a case and I was with somebody who knew him and she introduced me to him, and he started in the middle of this café, started berating me about my decision. It was very embarrassing and he wasn't at the hearing, but wasn't pleased at all with the decision.
>
> I recall one occasion where I gave an oral decision and the unsuccessful plaintiff wanted to debate it in the hearing room. I told him that once I'd made the decision my function was over, but that he had an absolute right to appeal my decision, and then left the room.

6.4.8 VARYING THE PROCEDURE

Under the *Labour Relations Act 1987,* it had been possible for the Grievance Committee to vary personal grievance procedures if sexual harassment had been alleged.[57] This provision was not included in the provisions of the *Employment Contracts Act 1991*. The *Employment Tribunal Regulations 1991* set out the procedures, which adjudicators were obliged to follow, but there was no special provision for sexual harassment proceedings.[58] However, it was possible under reg 49(2) of the *Employment Tribunal Regulations 1991* for adjudicators to intervene or vary the procedure in a fair manner. Regulation 49 read as follows:

> Procedure in adjudication proceedings –
>
> (1) In adjudication proceedings, the Tribunal shall usually proceed in the following manner:
>
> (a) Every witness shall be examined on oath (which term includes an affirmation):
>
> (b) Each witness may give his or her evidence-in-chief by reading or confirming a written brief or statement of evidence:
>
> (c) The Tribunal shall first hear the applicant and such evidence as the applicant may adduce:
>
> (d) The Tribunal shall then hear the respondent and such evidence as the respondent may adduce:
>
> (e) If the Tribunal is satisfied that evidence adduced by the respondent included material that could not reasonably have been foreseen by the applicant, it may, if that material requires an answer, allow the applicant to adduce evidence in rebuttal:
>
> (f) The parties may examine, cross-examine, and re-examine witnesses:
>
> (g) Either party may, in an address to the Tribunal, sum up the party's case:
>
> (h) The Tribunal shall consider the matter and deal with it in accordance with the appropriate Act.
>
> (2) Nothing in subclause (1) of this regulation prevents the Tribunal from intervening at any stage in any proceedings that are before the Tribunal or from varying, in relation to any such proceedings, in a manner that is fair, the procedure prescribed by that subclause.

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[57] *Labour Relations Act 1987*, s 221.
[58] *Employment Tribunal Regulations 1991*, reg 49.

Adjudicators were asked in what circumstances they would vary the procedure for conducting hearings as provided for in the regulations. All adjudicators stated that they would vary the procedure, if appropriate. Many said that flexibility was the key to the procedure operating effectively. The most frequently cited reason for varying the procedure was because of self-representatives. Some adjudicators advised that they would vary the procedure when both parties consented.

Some examples of how the procedure was varied were: changing the order of the process to make it fair to the parties;[59] hearing the employers' case first; changing the order of witnesses;[60] allowing re-examination;[61] questioning the witnesses if representatives were incompetent;[62] incorporating cultural requirements or requests;[63]

[59] *Employment Tribunal Regulations 1991*, reg 49(2) provided that 'nothing in subclause (1) of this regulation prevents the Tribunal from intervening at any stage in any proceedings that are before the tribunal or from varying, in relation to any such proceedings, in a manner that is fair, the procedure prescribed by that subclause. This provision appears to be in conflict with the general provision that the applicant in all civil cases is entitled to be heard first if he or she bears the evidential burden' (D Matheson (ed), *Cross on Evidence* (8th ed) 2005, 239. In personal grievance cases, the applicant has the obligation to prove that the action which caused the grievance arose after which the respondent had an obligation to justify the decision. See Chapter 2.3.3(a) for a brief discussion on the burden of proof in personal grievance cases.

[60] *Employment Tribunal Regulations 1991*, reg 49(2) provided that the adjudicator could alter the order of witnesses, which contravenes the general principle that each party can determine the order of witnesses. See *Montego Motors Ltd v Horn* [1971] 2 NZLR 21, and D Matheson (ed), *Cross on Evidence* (8th ed) 2005, 234.

[61] Ibid, reg 49(1)(f) allowed the parties to examine, cross-examine and re-examine witnesses.

[62] Ibid, reg 49(2) enabled the Tribunal to intervene at any stage in any proceedings that are before the Tribunal, in a manner that is fair. In general terms, Judges may ask questions of witnesses to clarify an issue or to help a witness or party understand the wording of a question – D Matheson (ed), *Cross on Evidence* (8th ed) 2005, 326. However, they may not become part of the debate itself and take on the part of a representative; *Yuill v Yuill* [1945] 1 All ER 183; D Matheson (ed), *Cross on Evidence* (8th ed) 2005, 236.

[63] This type of variation of the personal grievance procedure was possible under regulation 49(2) *Employment Tribunal Regulations 1991* where it was stated that the Employment Tribunal could vary in relation to any such proceedings in a manner that was fair the procedure provided in the appropriate sub clause.

varying the procedure in sexual harassment cases according to needs;[64] being flexible with the regulations;[65] swearing self representatives in[66] and 'letting them run'.[67]

6.4.9 CASELOAD

One possible reason for the delay in obtaining an adjudication, and subsequently a decision, may have been the caseload of adjudicators. As discussed in Chapter Five, the caseload of adjudicators varied between Registries, as did the number of adjudicators hearing personal grievances.[68] It was found in Chapter Five that adjudicators in Christchurch had a significantly higher caseload than any of the jurisdictional centres and also had a lower number of adjudicators than Auckland, Hamilton and Wellington.[69] Adjudicators were asked how they would describe their caseload in comparison to that of other adjudicators.

Table 6.4: Caseload of Adjudicators

Adjudicator's Response	**Rate (N=20)**
Fair	11
Heavy	7
Light	0
Don't Know	2

No adjudicators believed that their caseload was light. Of the category of adjudicators who thought that their workload was fair, four were from Auckland, five from Wellington, and two were from Dunedin. No Adjudicators in Christchurch believed

[64] Any such variation was a further possibility under regulation 49(2) *Employment Tribunal Regulations 1991.*
[65] The regulations themselves provided some flexibility as to process but what was actually meant by being flexible with the regulations was not clear.
[66] This meant allowing a self-representative to simply tell their own story and allowing them to act as their own witness.
[67] In theory, this process conflicted with reg 49(1) as it stipulated the order and process which the Employment Tribunal was to follow. However reg 49(2) was a sort of 'catch all' provision and gave the Tribunal Adjudicators some flexibility in how they conducted their hearings.
[68] See Chapter 5.4.4.
[69] See Chapter 5, Tables 5.11 and 5.12.

that they had a fair caseload, although one did not know. Of those adjudicators who thought their caseload was heavy, five were from Auckland and two were from Christchurch. No adjudicators in Wellington or Dunedin believed that they had a heavy caseload in comparison with other adjudicators, although one adjudicator in Wellington did not know. It may have been that the case management approach taken by Wellington adjudicators resolved some cases thereby reducing the need for adjudication. Two adjudicators did not know what their caseload was in comparison to other adjudicators. This may have been because they were unaware of the workload of others. On reflection however, this question was too broad: it should have asked about their caseload in comparison to that carried by other adjudicators, as well as their caseload in general terms.[70] A further question on the impact of high workload could have been what this did to the quality of case analysis and decision making as the responses highlighted delay as a factor impacting on the quality of outcomes.

Several adjudicators remarked that delays in decisions being issued affected the caseload. One adjudicator stated:

> On a gut feeling I probably have a fairly high proportion…and that's certainly not a complaint. I give more decisions orally on the day of the hearing than any other Tribunal Member. I've done that in nearly 50% of cases I've heard since starting in the Tribunal.

Another adjudicator stated that:

> In Auckland in any case, case allocation was done on a rota system where we had so many cases set down, and it was the same for everybody. Some people could not get through the caseload and others could. My decisions were issued always within 6 weeks of the hearing, often less than that. Some adjudicators took 18 bloody months you will find if you have a look at the figures. It didn't contribute to a good situation. Some adjudicators just couldn't cope with the decision-making process.

[70] For a discussion of the caseload of adjudicators and the number of adjudicators in each jurisdiction, see Ch 5, Tables 5.11 and 5.12 and accompanying text.

Interviews indicated that some adjudicators experienced frustration at the caseload that they carried or completed in comparison to other adjudicators. For example, one adjudicator stated, '[i]n the first few years of the '91 legislation, [my caseload was] heavy. When I found out what some of my colleagues were doing, and changed my ways, [it was] fair. Now read between the lines…'. The above comments illustrate that there was a considerable degree of uncertainty for parties to a personal grievance both on availability of adjudicators due to their caseload and on how long they would have to wait for a decision. It may have been that the adjudicator gave an oral decision on the day or it may have been that parties would have to wait for up to 18 months for a decision to be produced. If reinstatement was being sought, this would have caused considerable uncertainty and could have been financially detrimental for parties because they would have had to wait.[71]

6.4.10 TIME LAPSE

One of the main problems for parties using the adjudication system was the delays in the process. There was often a considerable delay between the event/s which gave rise to the personal grievance and its filing with the Tribunal, a delay between filing and adjudication, and a delay between the hearing and the date of decision.[72] As noted in Chapter Five, these delays were contrary to the expressed purpose of the legislative provision.[73] Tribunal staff and adjudicators did not have any control over or impact on delays between the event/s which gave rise to the personal grievance and the date of filing because lodging a personal grievance was the sole responsibility of the

[71] For an assessment and discussion of time delays in the Tribunal see Chapter 5.4.9. For a discussion on reinstatement see Chapter 2.4.4(c) and Chapter 5.4.7(b).
[72] See Chapter 5, Tables 5.37 and 5.40, and accompanying text.
[73] See Chapter 5.4.9, and [1991] 524 NZPD 1437.

applicant.[74] The only time constraint was the initial notification of the personal grievance to the employer being the 90 day rule, by which applicants had to notify to the employer within 90 days of the event/s giving rise to the personal grievance.[75] Beyond notification no expressed time limit, apart from a six year constraint contained in the *Limitation Act 1950* s 4, existed before the matter had to be lodged with the Employment Tribunal. However, in cases where exceptional circumstances could be shown, Employment Tribunal adjudicators could waive the 90-day requirement and allow the personal grievance to be heard even if it was lodged outside the 90-day limit.[76] Further comments by adjudicators on the 90-day rule and applicants' obligations in out-of-time applications, especially in relation to costs, will be discussed later in this chapter.

All adjudicators stated that some of the delays between the personal grievance and filing were caused by the slowness or availability of representatives. Six adjudicators specifically said that lawyers caused delays during that time.[77] Other factors identified by adjudicators that contributed to the delay between the event/s resulting in a personal grievance and lodging included: contingency representatives delaying the process to raise fees;[78] personal pressures on parties; whether parties went to mediation; location of where the personal grievance occurred; availability of both representatives to assist; lack of co-operation between the parties; excessive exchange of correspondence between representatives which may have resulted in higher fees and caused delay; the 90 day rule which may have resulted in a three month delay

[74] *Employment Tribunal Regulations*, reg 4.
[75] *Employment Contracts Act 1991*, s 33.
[76] Ibid, ss 33(3) and (4). For a discussion on the application of the exceptional circumstances rule, see Chapter 2.4.1(c).
[77] For lawyers' views on delays, see Chapter 7.6.3.
[78] Contingency representatives were those whose payment depended on the outcome of the case, for example 'no win, no fee' representatives in Christchurch.

between the event/s resulting in a personal grievance and its lodging; and the procedure itself, that was, writing a letter, receiving a response and then filing.[79] As can be seen from these responses, there were many factors that contributed to the delay between the event/s resulting in the personal grievance and filing with the Tribunal. As mentioned above, Tribunal staff had no impact on delays during this period. However, the actions of representatives could have had an impact at this point. Therefore, the responsibility for any delay at this stage of the process may not in all cases be solely attributable to the actions of the applicant.[80]

The second time lapse was between the date of filing the personal grievance with the Employment Tribunal and the date of hearing. When the *Employment Contracts Act* was passed in 1991, there were a number of personal grievances that had not been resolved. Consequently, personal grievances that had been lodged under the old system remained outstanding and were being heard alongside personal grievances that had occurred when the *Employment Contracts Act 1991* was in force. The Employment Tribunal, therefore, was hearing personal grievances under both pieces of legislation.[81] Adjudicators acknowledged that there was a significant backlog from the *Labour Relations Act 1987*, and that this was one of the reasons why there was a significant delay between lodging a personal grievance under the *Employment Contracts Act 1991* and its adjudication.

One adjudicator remarked:

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[79] *Employment Tribunal Regulations 1991*, s 9. For a discussion of lodging a grievance and the 90-day rule, see Chapter 2.4.1(a) and 2.4.1(c).
[80] See para 6.5.15 for a discussion on the Exceptional Circumstances Rule.
[81] See Chapter 2.5.

> The [Employment Tribunal] suffered from problems not of its own making. It began life charged with the disposal not only of a backlog of cases under the [Labour Relations Act] but within [three months' a] backlog of its own cases accrued between 15 May 1991 when the Act came into force and 19 August 1991 when the first [Employment Tribunal] Adjudicators were sworn in. The caseload rose to 5500 cases annually about 1/8 of the whole civil litigation burden in all jurisdictions in [New Zealand], without a commensurate increase in [Employment Tribunal] adjudicators. At peak the [Employment Tribunal] had 28 adjudicators nationally, not all of them full time. By way of contrast the total appointments to the [Employment Relations Authority] and the new Mediation Services amounted to 55 full time officers.

Another factor affecting the delay at this stage was the availability of parties and their representatives. As found in Chapter Five, most parties to personal grievances chose to be represented rather than representing themselves; therefore, the availability of representatives was a contributing factor in the delay of the process.[82]

There were also a number of administrative factors that adjudicators believed contributed to the delay at this stage. These included: institutional delays; lack of resources; availability of rooms; administrative incompetence; and Employment Court requirements for the Registry to consult.[83] A further contributing factor was interlocutory matters being determined by the Court, which resulted in further delay in hearing the substantive personal grievance.[84] It was also found in the Industrial Tribunal in England that legal representatives were more likely to extend the process by taking interlocutory steps.[85]

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[82] See Chapter 5, Table 5.10.
[83] The consultation referred to here related to such matters as dates, times and venues for adjudication hearings. Often there were difficulties when several parties were involved, and a number of representatives' diaries had to be matched up. Telephone discussion with Alistair Dumbleton, Former Chief of Employment Tribunal, 1 November 2005.
[84] See Chapter 2.4.4(e) for a discussion on interim reinstatement. The Employment Tribunal also had authority to hear applications to produce documents which according to one Employment Tribunal adjudicator was the only interlocutory function which the Tribunal had the authority to participate in. Telephone discussion with former Tribunal Adjudicator, Jeff Goldstein, 1 November 2005. See also *Employment Contracts Act 1991*, ss 96 and 126(2)(c).
[85] Ibid.

Adjudicators also considered that there were too many personal grievances due to increased jurisdiction while there were too few adjudicators to hear the cases.[86] One adjudicator remarked:

> [w]hen you file you get into the whole paraphernalia of the regulations that certain things happen in response times and all that. And then, when all that was done, it went into the back-log. Once everything was completed it went to the end of the line, and the line was way out of control because there were too many cases and too few adjudicators. And it wasn't helped by the fact that some adjudicators thought it was ok to not put a decision out for 18 months.

Adjudicators also noted that a deficiency of the *Employment Contracts Act 1991* was that there was no time limit for referring a personal grievance to the Tribunal after notifying the employer.

The third stage where time delays could have occurred was between the date of hearing and the date the decision was produced. Adjudicators noted the following elements: there was a delay in adjudicators writing their decisions and there were poor cases that dragged the procedure out unnecessarily.[87] Other factors which crossed over into the third stage were: the legal profession causing delays because they were used to lengthy court cases and delayed litigation; representatives who might sit on the case and delay taking action; backlog and institutional delay from the *Labour Relations Act 1987*; a lack of co-operation between parties during the hearing process; the hearing procedure itself, which could have been protracted if the case had begun with mediation; and lack of resources in the Tribunal, including a lack of adjudicators. One adjudicator commented:

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[86] For numbers of adjudicators in each centre, see Table 5.11. The increased jurisdiction was created under *Employment Contracts Act 1991*, s 33(1), which provided that all employees irrespective of union membership were entitled to take a personal grievance.
[87] For a short discussion on time lapse, see Chapters 7.5.8 and 5.4.9.

> The Employment Tribunal took a tremendous amount of flak and I remember that a number of members of the Tribunal actually lost their jobs as a result of the Tribunal being blamed for delays which were caused more by the way that the legal profession in particular operated than anything else. They seem to have a different view of time. They're used to courts on schedules where it's not unusual for litigation to be 12 months, 2 years, or three years out.[88]

These comments could suggest that legal representatives are not best suited to a Tribunal adjudication system which was intended to be informal and not to replicate the formal litigation structure of the courtroom.

6.4.11 MEDIATION

There was no obligation to attend mediation, so parties could make their own determination about whether mediation was useful and consequently whether they would participate.[89] Adjudicators were asked to consider what the advantages and disadvantages to mediation were for parties to a personal grievance. Advantages commonly raised by adjudicators were: 1) mediation clarified the issues between the parties; and 2) mediation provided both parties with a better understanding of the opponent's case. Further advantages identified by adjudicators were:

- Mediation identified the risks and merits of proceeding to adjudication;
- Mediation filled gaps in cases prior to adjudication;
- It was cheaper for parties if they settled at mediation;
- Parties could get a third party/mediator opinion;
- It showed a willingness of the parties to discuss the issues;
- It meant that parties were better prepared when they appeared at adjudication;
- Parties could retain control of the decision-making process;
- Confidentiality;

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[88] These observations of the legal profession were shared by commentators in England, who found that as with getting to a hearing, legal representation is associated with more time being taken in a hearing. Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 205, also noted that:

> [w]hile in part this is possibly a result of more complex cases being handled by legal representatives…the time taken also reflects the manner in which legal representatives choose to present cases, often with detailed opening and closing statements, calling of several witnesses, and citing of case law.

[89] *Employment Contracts Act 1991*, s 80. For a discussion on attendance at mediation see Chapter 2.3.2.

- Familiarity with the process of mediation would be an advantage if the case was referred back to mediation by an adjudicator.

One adjudicator said:

> It was incredibly efficient and sophisticated – I have no idea why they decided to disband it. It was very orderly and it really did mean that most things were sorted out at mediation.

These observations on the advantages of mediation are similar to those made by Paul Roth, who suggested that mediation was advantageous because it was quick, cheap, less stressful, private, voluntary, and identified outstanding issues or concerns.[90]

Adjudicators, although very supportive of mediation, identified disadvantages to mediation as:

- Mediation was a disadvantage if the case did not concern a genuine personal grievance, but was rather only about enforcement of a clear obligation;
- It was more expensive if mediation was not successful;
- There could have been a possible time delay if mediation was unsuccessful;
- Mediation may have entrenched positions further;
- If the parties did not attend mediation it could have sounded in costs;
- Mediation was a disadvantage if parties refused to negotiate;
- If mediation was unsuccessful, the detail had already been disclosed prior to adjudication which could result in disadvantage to the other party;
- If not settled at mediation, it could be an emotionally costly process.

From 30 June 1996 to 30 June 1997, 5424 applications to the Employment Tribunal were received; 3202 mediations were scheduled; and 400 adjudications were serviced.[91] From 30 June 1997 to 30 June 1998, 5332 applications to the Employment Tribunal were received; 3107 mediations were scheduled; and 492 adjudications were

[90] P Roth, 'The Grievance Procedure' in J Hughes, P Roth and G Anderson (eds), *Personal Grievances* (1999) 2.20. For a discussion on mediation and mediation procedure see Chapter 2.4.2.
[91] Labour Department, Annual Report ending 30 June 1997, 36.

serviced.[92] As mentioned in Chapter Five, it is not clear from these figures how many of those applications related to personal grievance claims and how many were disputes or other forms of action. The figures do make it clear that there were many more mediations scheduled than adjudications. However, it is not known how many personal grievances were resolved at mediation as mediation proceedings were privileged under the *Employment Contracts Act 1991*.[93] Between 1996 and 1997, 2864 mediations were conducted by the Mediation Service; for 1997 to 1998 the number of mediations conducted was not recorded.[94]

6.4.12 REMEDIES

In general terms, adjudicators were asked about remedies and how they awarded them. The questions were divided up into sections that asked about specific remedies.[95] Adjudicators' responses tended to be blurred, and they frequently spoke in general terms about how they awarded compensation and assessed reimbursement and whether or not reinstatement was a potential option.

Remedies for personal grievances were available under ss 40, 41 and 42 of the *Employment Contracts Act 1991*. Available remedies included reimbursement, reinstatement, and compensation.[96] Where remedies sought by parties to a personal grievance were perceived to be unreasonable, adjudicators were asked how this affected their approach. Most adjudicators replied that they would just ignore or not take much notice of unreasonable remedies sought. One adjudicator mentioned that lawyers put big claims in just to be on the safe side. It was also suggested that if

[92] Ibid 42.
[93] *Employment Contracts Act 1991*, ss 37 and 88(7).
[94] Labour Department, Annual Report for year ended 30 June 1996, 138. Also see Labour Department, Annual Report for year ended 30 June 1997.
[95] See Appendix IV.
[96] For a detailed list of remedies available under the Act, see Chapter 2.4.4.

parties sought unreasonable remedies it may sound in costs against them. Adjudicators mentioned that they would follow court precedents in awarding remedies.[97]

Some adjudicators said that if parties sought unreasonable remedies it did affect their approach and/or attitude to the parties and some thought less of representatives who brought excessive claims, as it gave applicants high expectations. Two adjudicators said that it subconsciously prejudices you against the applicant and consequently makes you wonder what the motives of applicants were who sought unreasonable remedies. One adjudicator stated that:

> I guess it depends on who has actually put down the remedies because if it's an unrepresented person he or she will have no idea of what's reasonable or what's unreasonable. If it's a solicitor that's put down something unreasonable, then I'd lay that at the door of that person and not at the door of the applicant by and large, although I accept that some applicants may give solicitors instructions to claim $200,000 when that patently isn't going to happen.

Another adjudicator mentioned that unreasonable remedies claimed alone were reasonable, but if accompanied by arguments which do not support the claim, it gave the adjudicator a poor view of the party.[98]

Reference to the data contained in Chapter Five regarding remedies sought and granted clearly shows that applicants rarely received remedies at the rate requested. Adjudicators must have become accustomed to significantly larger claims than they

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[97] In *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275; *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159; and *Minister of Education v Dailey* [1993] 2 ERNZ 321, the Court of Appeal provided guidelines on factors to be considered by the Tribunal when granting reimbursement and compensation. In *Chief Executive of the Department of Corrections v Dodds*, (unreported, CC6/03, Employment Court Christchurch, 4 March 2003, Goddard CJ) the Employment Court stated that the Tribunal would have to have acted on a wrong principle of law or made a wrong estimation of the respondent's loss. Goddard CJ stated that he may have awarded slightly less due to contributory fault, but this distinction would not have been significantly different.

[98] For a discussion of remedies sought and granted, see Chapter 5.4.7.

were prepared to award and it appears that in general terms they were not prepared to award beyond the levels suggested by the Employment Court.[99]

When reviewing cases from the Employment Tribunal in 1997, it was found that on occasion parties or their representatives sought remedies which were not contained in the legislation, for example, apologies, references, interest,[100] and higher reimbursements than court guidelines.[101] Adjudicators were asked what their attitude was to the parties if remedies sought were not provided for in legislation. Most adjudicators said that it did not affect their attitude to the parties and that they simply advised that the remedies they sought were not available. A number of adjudicators advised that it would have affected their attitude to representatives but not the parties themselves, while two adjudicators said that it would affect their attitude to the parties and that it might sound in costs. One adjudicator said that this problem could have been resolved by case management, and another believed that they could at times have circumvented the legislation. Four adjudicators took the view that other remedies were available through mediation. The nature of mediation was such that parties could negotiate any settlement that they deemed appropriate in the circumstances. If a mediated settlement was not adhered to by either party, it could be enforced by a

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[99] In *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659, Goddard CJ commented that the Tribunal was to reduce remedies where it was just and equitable (s 41(3)(b)). Arguably the Tribunal was not prepared to award to the level suggested by the Court as being necessary, in some cases.

[100] See *Beazley v Department of Justice* [1995] 2 ERNZ 465 where it was held that there was not general jurisdiction to award interest in claims for compensation and reimbursement. There was some possibility that interest may have been available via s 49 of the *Employment Contracts Act 1991* where arrears of wages and other monies available under s 48 of the *Employment Contracts Act 1991* were being considered. See G Anderson, J Hughes and P Roth, *Personal Grievances* (1999).

[101] These were mentioned by adjudicators as examples of remedies that were not available under the legislation. See also the *Employment Contracts Act 1991*, s 41(1)(b). In *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659, Goddard CJ commented that the limit of power of the statutory discretion was not to award more than the loss. Secondly, if there was a personal grievance and remuneration was lost, the employee was entitled to receive the amount of the loss, unless a good reason existed to deprive the applicant of the full amount.

compliance order.[102] One adjudicator noted that remedy claims could be made by parties through their representatives which were convoluted and showed a clear lack of understanding, and in that case it would be easier to find in favour of the other side:

> There's been cases where I've decided in favour of one side, simply because it's been open for me to do it. There's sufficient evidence to do it, and it's a hell of a lot easier than finding for the other [side], because it's so much harder to write.

This approach could have resulted in injustice to one party if their representative happened to take a more convoluted or complex approach when submitting their case and asking for remedies. Similarly, a party themselves may have taken a convoluted approach or asked for remedies that were not available without knowledge of constraints.

Adjudicators were given discretion under the Act to award whatever remedies were appropriate, although there were guidelines on the allocation of particular remedies and the courts also gave some directions to the Tribunal as to how remedies should have been awarded.[103] As there was discretion on how and if remedies were to be awarded, how adjudicators used that discretion was of interest. In general, adjudicators indicated their belief that the rules were clear so they just applied them and decisions were made on the evidence and the overall reasonableness of the

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[102] *Tucker v Cerissi Leather Ltd* [1995] 2 ERNZ 11. For more discussion of mediation, see Chapter 2.4.2.

[103] The guidelines for reimbursement were laid down Goddard CJ in *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659. They provided that: (1) A personal grievance had to be established; (2) As a result of the personal grievance remuneration was lost; (3) What was the extent of the loss; (4) Award the amount of the loss if it amounted to the equivalent of three months' ordinary time remuneration, or less; or (5) If the loss equated to three months' ordinary time remuneration, consider whether to award a greater amount by way of compensation; (6) Give consideration to any contributory fault; and (7) If contributory fault was found, reduce the amount to an extent that was just and equitable. The guidelines for reinstatement were set down by Goddard CJ in *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421. If it was possible to reinstate, reinstatement should ordinarily happen, unless the applicant could not have been placed in a position which was not less advantageous to the employee (s 40(1)(b)). On guidelines generally, see *Employment Contracts Act 1991*, ss 40, 41 and 42; *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275; *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159; and *Minister of Education v Dailey* [1993] 2 ERNZ 321.

package. When discussing specific remedies available under the Act, adjudicators took the following factors into account when exercising their discretion. This included the statutory obligation to take into account contributory fault in any personal grievance and reduce remedies accordingly under *Employment Contracts Act 1991*, s 40(2).

6.4.12(A) REINSTATEMENT

Adjudicators also followed case law considerations when issuing orders for reinstatement. These included taking into account objections by either party when reinstatement was being considered;[104] the consideration of whether the position or the work itself was still available;[105] whether there had been a breach of trust and confidence in the relationship between the employee and employer;[106] and if there had been a long delay in the personal grievance procedure being initiated.[107] Adjudicators also took into account whether or not reinstatement was practical under all the circumstances and viable on the merits of the case.[108] Adjudicators also made the following comments in relation to the feasibility of reinstatement: the belief that reinstatement was only a practical option for employers of large companies;[109] whether employees were genuinely seeking reinstatement or whether it was a bargaining tool; and adjudicators also considered whether or not the relevant position

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[104] *Port of Wellington Ltd v Longwith* [1995] 1 ERNZ 87 (CA).
[105] *Asken & Ors and 2 Ors v NZ Rail Ltd* unreported, Goddard CJ, 12 July 1994, WEC 33/94, where the issue was whether the work performed is still available.
[106] *Airways Corporation of NZ Ltd v Brunton* [1994] 1 ERNZ 352.
[107] *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 and *NZ Workers IUW v Papuni Station: Proprietors of Tahora 2F2* [1989] 3 NZILR 270.
[108] See *King v Director-General of Social Welfare*, unreported, Employment Court, Auckland, AEC 108/97, 26 September 1997, where Judge Colgan said in balancing the interests of the parties and practicability of ordering reinstatement it was necessary to consider the both past and future issues in an attempt to work out a practical solution.
[109] This view was shared by the Industrial Tribunal in England: Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (1985) 112.

was merely a job or an aspirational career step. A further consideration taken into account by adjudicators was whether the employing company was still in existence; if not, reinstatement could not be ordered. The final consideration for adjudicators was the likely effectiveness of the employee, should reinstatement have been ordered. These responses demonstrated that adjudicators took a range of contextual factors into account when deciding if reinstatement was appropriate.

When discussing reinstatement, one adjudicator commented:

> Reinstatement was rarely asked for, and this is a reflection of the delay. With the delay came not many reinstatements and in turn came 'don't bother applying for it' because the delay worked on the applicants and 'it's too late now, I've got on with my life'.

Another adjudicator also commented that reinstatement was always the most appropriate method of resolution if practicable. However, as seen in Chapter Five, reinstatement was not a remedy that was frequently sought or granted in dismissal cases.[110]

6.4.12(B) REIMBURSEMENT

In response to the question of which factors they took into account when awarding reimbursement, adjudicators advised that in exercising discretion they took into account the factors stipulated by the legislation and precedents. This included the actual loss the employee had experienced and whether or not they had made any attempts to mitigate that loss.[111] Adjudicators were unlikely to have awarded more than 12 to 18 months' reimbursement of wages as the applicant should have found alternative employment by the time of the hearing.[112] Adjudicators had to decide

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[110] See Table 5.31 and related text.
[111] *Employment Contracts Act 1991*, s 41(1)(b).
[112] Ibid, ss 41(1)(b) and 41(2). In *Pascoe v Covic Motors Ltd* [1994] 2 ERNZ 152 it was said that '[t]he duty to mitigate one's loss is to be taken into account not under the discretion to extend the period of

whether or not to exercise the statutory discretion to award more than three months' wages by using the provisions contained in the Act.[113] Section 41(3)(b) also required adjudicators to take into account any contributory behaviour of the employee and accordingly make any reduction to reimbursement on the basis of fairness and equity. Adjudicators also stated that in awarding reimbursement they would have based their decisions on the mathematical stipulations contained in ss 40 and 41 of the *Employment Contracts Act 1991*. That meant calculating wages or other money lost and awarding reimbursement based on the lesser of three months' ordinary time or the lost remuneration, whichever was the lesser.[114] When determining reimbursement adjudicators also considered whether the claim made by the applicant was accurate, and they may have reached their decision on the basis of the employer's ability to pay.

Adjudicators exercised their discretion to take into account varying circumstances in different ways, but they generally followed the formula provided by legislation and directives from the Court, thus applying the law to the facts:

> You have to apply the law. There is some conflict in what that means, whether you start out by looking at what has been lost and bring it down from say 9 months, if that's the time they're claiming, or, look at three months, and whether you should exercise your discretion and go up, or exercise your discretion and go down. But we now know that the law requires people to be looking for jobs from day one rather than after three months and we have to look at mitigation to determine reimbursement level, how much they've lost and whether it's because of the grievance. The legal principles are just applied there.

6.4.12(c) Compensation

Employment Tribunal adjudicators were asked what factors they took into account when awarding compensation as this was an area where discretion was less

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loss expressed in s 41(2), but when considering the burden placed on an employee by s 41(1)(b) and s 41(2) to prove remuneration lost as a result of the personal grievance.'

[113] Ibid, s 41(2).

[114] *Employment Contracts Act 1991*, ss 40(1) and 41(1).

constrained and subjective in nature. For example, the gender, ethnic origin or wage/salary level of the applicant. Compensation could have been awarded for humiliation, loss of dignity and injury to the feelings of the employee, and/or loss of any benefit.[115] When adjudicators were asked this question they did not distinguish between awards of compensation for loss of dignity and injury to feelings, and loss of benefit, but tended to comment in more general terms. For example, some of their comments were that they took into account such matters as: the seriousness of the substantive issues and how they directly affected the employee; and the context of the whole situation, for example, the type of work, the relationship with employer/supervisor, the likelihood of the employee finding future work and the damage which the employee had suffered. Further issues which adjudicators considered included the level of humiliation and distress – inevitably this involved a subjective approach including assessing any ongoing humiliation and distress. This involved ascertaining issues of credibility and weighing up competing evidential claims. A further approach used by adjudicators was applying the 'egg-shell skull' principle. That was, employees were taken as they were found. This could have included the age, gender, ethnicity or disability of the applicant. Adjudicators thought that if employers had limited resources there was little point in awarding large amounts of compensation. They therefore took into account the ability of the employer to pay when awarding compensation. If the employee had longer service with the employer they were more likely to have been awarded higher compensation than if they had been short term employees. Further factors considered by adjudicators when awarding compensation included the merits of the case, precedents, the honesty of the employees concerned and contributory fault.

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[115] Ibid, ss 40(1)(c)(i) and 40(1)(c)(ii).

The following tables provide a further breakdown of factors that adjudicators took into account when awarding compensation.[116]

Table 6.5: Adjudicators' Views on Gender

Taken into Account?	**Adjudicator response rate (N= 18)**
No	14
Not Consciously	2
Depending on Circumstances	1
Depending on Family Status and Responsibility	1

Table 6.6: Adjudicators' Views on Ethnic Origin

Taken into Account?	**Adjudicator response rate (N = 18)**
No	15
Not Consciously	2
Yes, Depending on Circumstances	1

Although most adjudicators recognised the importance of neutrality in relation to consideration of gender and ethnic origin, there was general awareness that these factors were often present in personal grievance claims. While gender and ethnicity were not directly relevant to compensation, they were acknowledged as inherent characteristics of applicants and therefore considered indirectly by adjudicators when awarding compensation. This gives expression to the 'egg shell skull' principle where applicants were taken as they were found. Such characteristics were thus relevant to the individual applicant and the impact on them personally:

> Gender doesn't come into it. What I tend to take into account is the evidence of the impact on the individual.

[116] Cf Dickens et al above n 87, 125, who observe that the Industrial Tribunal recompensed those dismissed unfairly for the loss they suffered as a result of the dismissal but that the unfairness itself attracted no compensation.

For example, one adjudicator thought that gender could affect their decision making from another angle; where female applicants may have had significant family responsibilities that impacted on the decision, in which case, the gender of the applicant concerned did affect the decision of the adjudicator, and how remedies were awarded.

Table 6.7: Adjudicators' Views on Age

Taken into Account?	**Adjudicator response rate (N = 12)**
Yes	3
No	3
Length of Service rather than age	6

Table 6.7 above shows that six adjudicators took into account length of service when awarding compensation rather than age. Three adjudicators indicated that they did not take age into account.

Table 6.8: Adjudicators' Views on Wage/Salary

Taken into Account?	**Adjudicator response rate (N= 13)**
No	4
Yes	6
Philosophically No, but in Reality, Yes.	3

Table 6.8 shows the responses from adjudicators to the question of whether the salary or wage level of the applicant was a factor when awarding compensation. This table shows that six adjudicators said that they did take into account wage and salary level. Four indicated that they did not and three replied that philosophically this ought to have made no difference but in reality it did.

All adjudicators acknowledged that the decision-making process was very subjective and based upon an assessment of individuals' characteristics their circumstances and

credibility. One adjudicator commented '[y]ou can have the same set of facts, get six different adjudicators, six different judges, you'd probably get six different answers. It should be within a range.'

> What was important to me was how long a person had been in the job because it's not just a question of seniority, it's a question of emotional investment – the longer you've been in a job, the stronger your expectations are, and the more you are entitled to consideration in that particular context, and if you don't get it and it's a particularly abrupt situation like the one I was describing before of a mature woman close to the age of retirement who got brutally dumped on, then her evidence as to the degree of humiliation and hurt will be more compelling in the context.

6.4.12(D) SEXUAL HARASSMENT

Adjudicators were asked what remedies they awarded in sexual harassment cases.[117] Generally, adjudicators indicated that remedies depended on the circumstances of the case and any loss or harm suffered by the Applicant. Remedies awarded were often low, with one adjudicator stating that they were not prepared to be the first one to order high amounts. Further, few adjudicators made recommendations.[118] Reasons for not making recommendations included the difficulty in avoiding a punitive element; a perceived presumptuousness in making recommendations; and difficulty of enforcement.[119] On the positive side, one adjudicator advised that they would make

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[117] See para 6.5 for further discussion of sexual harassment claims.

[118] Under s 40(1)(d) if the Employment Tribunal had found an employee had been sexually harassed in their employment the Employment Tribunal had the authority to make a recommendation to the employer over the action which the employer should have taken in respect of the complainant, or the person who was guilty of the behaviour. The action could have included transferring the person concerned, taking disciplinary action against that person, or taking rehabilitative action in respect of that person. Goddard CJ , in *Z v A* [1993] 2 ERNZ 469, stated that in cases where sexual harassment had been proved, amongst other forms of recommendations the Employment Tribunal had the ability to make recommendations regarding the rehabilitative action which an employer could have taken in such circumstances. In *Northern Clerical etc IUW v Queen City Cabs Ltd* [1988] NZILR 1050, the Labour Court refused to enforce a recommendation by way of compliance order as this would not have been practicable. However, it was not clear whether the Employment Court could have followed this procedure using s 56 of the *Employment Contracts Act 1991*, as recommendations were not included in the list of remedies which could have been enforced using this section. See G Anderson, J Hughes and P Roth, *Personal Grievances* (1999).

[119] The *Employment Contracts Act 1991* had no enforcement provisions for recommendations. Recommendations by their nature were advice to the employer on how to protect employees from any

recommendations for employers who had no policy for dealing with sexual harassment or in cases where there were serious problems. Another adjudicator approached sexual harassment claims in the same way as any other case with another recommending that the person doing the harassing be transferred, and not the person being harassed. The adjudicators acknowledged a more sensitive approach was required in sexual harassment cases and evidence often difficult to assess but the relatively small number of cases adjudicated made it difficult to identify significant remedy trends from the responses.

6.4.12(E) CONTRIBUTORY FAULT

Adjudicators were asked how they took into account and measured contributory fault when awarding remedies. This is a significant element which could have had a substantial impact on how remedies were granted. Section 40(2) of the *Employment Contracts Act 1991* stated that where the Tribunal or the Court determined that an employee had a personal grievance because the employee had been unjustifiably dismissed, the Court should consider whether the actions of the employee contributed towards the situation. The Court or Tribunal had the power to reduce remedies accordingly. In cases of reimbursement, s 41(3)(b) of the *Employment Contracts Act 1991* provided that a reduction in payment to the employee could be made where the situation complained of was partly due to the fault of the employee. Any reduction had to be made on a just and equitable basis.

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future form of sexual harassment. Comparison has been made with the provisions in the *Labour Relations Act 1987*, s 41(3) which stated that that any order gave direction to the employer on how to deal with sexual harassment in the future. See G Anderson, J Hughes and P Roth, *Personal Grievances* (1999).

Adjudicators advised that when considering how to award remedies, they took into account the behaviour of the applicant in the particular circumstances of the case. As well as considering the factual circumstances adjudicators were required to consider the legislative framework and apply the law appropriately. Adjudicators also considered the overall effects of the applicant's actions in proportion to the personal grievance.[120] They also had to balance the extent to which the applicant's actions were linked to the dismissal.[121] Adjudicators also examined the evidence being presented and adopted a subjective approach to its application and consequent award of remedies.[122] When considering the effect and extent to which contributory fault should be taken into account, adjudicators accepted that they looked at the blameworthy behaviour of the applicant using a 'moral yardstick'. This approach was largely dependent on the views and approach being taken by individual adjudicators and did not necessarily include any precise legal application or consideration.

Adjudicators disagreed on the following four factors:

1. Whether they should follow the directions of the Employment Court;[123]
2. On views taken by the Employment Court on whether you could have contributory fault in procedural fairness cases;
3. Whether you could have had more than 50 percent contributory fault; and
4. Whether to view contributory fault by way of percentage or not.

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[120] *Employment Contracts Act 1991*, s 40(2).
[121] Ibid, s 41(3)(b).
[122] In *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334, Judge Travis quoted Brandon LJ in *Nelson v British Broadcasting Corporation (No 2)* [1980] ICR 110; 'I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.' See G Anderson, J Hughes and P Roth, *Personal Grievances* (1999).
[123] See Chapter 2.4.4(d) for a discussion on the factors which had to be followed when establishing the causal link when contributory fault is being considered.

The measuring of contributory fault by adjudicators in personal grievance cases was inconsistent. Some adjudicators chose to apply guidelines developed by the Employment Court while others did not. One adjudicator recognised this, commenting that the calculation of contributory fault was not a precise science and largely a matter of instinct.[124] The discussion above has illustrated that the calculation and impact of contributory fault in personal grievance cases was variable depending on a number of factors including: the circumstances of the case, which adjudicator was hearing the personal grievance, and whether adjudicators chose to follow the directions of the Employment Court.

6.4.12(f) Court Directions

This was representative of remedies in general. The Employment Court gave adjudicators direction on how remedies should be awarded and the amounts that were appropriate for different types of personal grievance. Adjudicators were asked what their attitudes towards the Court's directions regarding remedies were. Adjudicators' responses were varied to this question. Most adjudicators acknowledged that they had to follow the Court, but some found ways of distinguishing cases and using discretion. One adjudicator made the following comments in relation to directions by the Court on remedies:

> The proper answer is that the Tribunal had to follow the Court's decisions. The Court has quite clearly said that this is the law in relation to assessing, apportioning remedies, and that's the duty of the Tribunal to follow. I said that's the proper answer, but in some cases lip service may be paid to it, ha ha. That's not to say that I don't sit there and say that Court decision is a load of rubbish, and I won't sort of find a way that I can say that that Court decision doesn't actually apply to the facts of this case.

[124] See Chapters 2.4.4(d) and 5.4.6 for further discussion on contributory fault.

Another adjudicator commented that: 'I ignored them. They're so bloody inconsistent in that Court. For two or three years they'll be thumping one way of approach, then they completely back track.'

6.4.13 USE OF SECTION 34 *EMPLOYMENT CONTRACTS ACT 1991*

Section 34 of the *Employment Contracts Act 1991* provided: 'Nothing in this part of this Act or in any employment contract shall prevent a finding that a personal grievance is of a type other than that alleged.' This meant that the Tribunal and/or the Employment Court had a discretion as to the type of the personal grievance which was found.[125] For example, in *NZ Van Lines v Gray* [126] the applicant alleged that they had been dismissed on 9 January. The adjudicator invited parties to make submissions on whether the relevant date was 12 January and whether the action complained of could have been an unjustified disadvantage or dismissal. In response, the employer's representatives submitted that the grounds should not have been altered. However, the Tribunal directed that further submissions and evidence could have been made and heard at a later date. Parties made no further submissions. As a result, the Tribunal held that the applicant had been unjustifiably dismissed and/or disadvantaged, and this was from the later date of 12 January. The company was ordered to reimburse lost wages and pay compensation. The Employment Court held that as the adjudicator had provided both parties with ample opportunity to address him on the alternate date, he acted appropriately in giving the parties notice of his intention. The Court therefore held no injustice had occurred.[127] Also see *McPherson v Tavern Casino Ltd t/a Birdcage Tavern & Liquorland*[128] where a claim of unjustified dismissal under s

[125] J Horn (ed), *Employment Contracts* (first published 1991), vol 1 EC34.04.
[126] [1999] 1 ERNZ 58.
[127] J Horn (ed), *Employment Contracts* (first published 1991), vol 1 EC34.04.
[128] 21/3/00, Colgan J, AC16/00.

27(1)(a) of the *Employment Contracts Act 1991* was more appropriately dealt with as a claim for unjustified disadvantage under s 27(1)(b) of the *Employment Contracts Act 1991*.[129]

Adjudicators advised that this was not a significant issue, with three adjudicators stating that this issue did not come up very often and a further three stating that this issue had not come up at all. When deciding whether or not to amend the type of personal grievance; adjudicators said that they took several factors into consideration including: the real nature of the personal grievance as perceived by the adjudicator; the nature and the facts of the case; the justice of the case; fairness; experience of representatives; whether the parties asked the adjudicator to amend the type of personal grievance; and whether the respondent had a fair opportunity to answer the issues. In amending the type of personal grievance under s 34, adjudicators said that they might simply make the change, give parties a chance to comment, or try and get the parties to agree. One adjudicator remarked: 'I would always try and get the parties to agree. Normally they do because you tell them if you are not back here today you'll be back in a week or in another time and it will cost you more money.' The fact that some parties and their representatives made claims under the wrong headings could suggest that the requisite process may not have been as straight-forward as was the intention of the legislators.[130] Or alternatively, it could suggest that legal representatives were insufficiently familiar with appropriate heads of personal grievance and their requirements. However, any problems in this direction were able to be resolved by the use of s 34, but the adjudicators had a fairly flexible approach to this and took a number of contextual issues into account.

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[129] J Horn (ed), *Employment Contracts* (first published 1991), vol 1 EC34.04.
[130] W F Birch, Report Back Speech Notes – Press Release, 22 April 1991.

6.4.14 DECISIONS APPEALED

Decisions of the Employment Tribunal could have been appealed to the Employment Court on points of law.[131] All adjudicators interviewed said that they had had decisions that had been appealed. Adjudicators were not specifically asked if any appeals occurred in 1997 so the responses received from adjudicators related to their time as Employment Tribunal Adjudicators. Fourteen adjudicators said that appeals had been based on remedies; nine adjudicators stated that appeals had been on substantive grounds; and eight adjudicators said that appeals had been both on remedies and substantive grounds. Two adjudicators said that their decisions had been appealed on a complete range of issues. A number of different reasons were given by adjudicators as to why their decisions had been appealed. It was possible that the decision had not been written tightly enough, there may have been an arguable case for appeal, or in some cases the decision may simply have been wrong on factual and/or legal principles. It was also acknowledged that in some cases parties did not understand the decision or simply disagreed with it. In some instances it was representatives advising their clients to take an appeal, whether as a tactical measure, to preserve union strength by providing a united front of workers against the employer, or more significantly because the nature of the case meant that it could be a significant precedent for either party that established groundbreaking rules for other cases. Adjudicators also suggested that some parties irrationally appealed simply because they could afford to, or because they just wanted money. One adjudicator believed that some parties appealed simply because their views on the personal grievance were so entrenched – 'the nutty factor' as one response suggested:

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[131] *Employment Contracts Act 1991*, s 95. For a discussion on evidence and limitations on appeal, see Chapter 2.4.3(e).

> There are people who, no matter what you say, are convinced of the inevitable rightness of the situation and will take it to the Privy Council if they can.

One adjudicator said that borderline cases that took considerable time determining were often not appealed. By contrast, another adjudicator said that the cases which you spent most time considering were borderline were the ones most often appealed. The mixed responses indicated that unless the case involved a significant potential precedent or strong sense of injustice by either party that the process or outcome had been unfair it was difficult to make any general assumptions as to which cases would have been appealed and why parties appealed. However, a relatively low rate of appeals tended to indicate the general efficacy of the process.

6.4.15 LEGAL OBLIGATIONS

When lodging and responding to a personal grievance, both parties had legal obligations under the *Employment Contracts Act 1991*.[132] These included an obligation to inform the respondent if the applicant was legally aided, an obligation to file documents on time, and ensuring that the correct cause of action was cited. Adjudicators were asked what view they took of parties not complying with legal obligations. This question was asked for three reasons: firstly, to determine whether parties or their representatives were taking a careful and thorough approach to the personal grievance process; secondly, to ascertain whether adjudicators were required to spend a significant amount of time resolving legal inaccuracies; and thirdly, whether parties' non-compliance with their legal obligations affected adjudicators' attitude to the claim, its resolution, or the parties themselves.

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[132] For details of the obligations of parties in personal grievance situations see *Employment Contracts Act 1991*, Part III, and first schedule to that Act. Also see *Employment Tribunal Regulations 1991*.

The general response from adjudicators was that they judged non-compliance on the nature and facts of the case, together with an assessment of whether there had been a disadvantage to the other party due to the non-compliance. Adjudicators had different ways of dealing with non-compliance with legal obligations. It was acknowledged that at times it would be a balancing act to ensure that there was no injustice caused by one party not complying with their legal obligations. It was also acknowledged that some problems with requirements could be easily resolved procedurally by Tribunal staff, usually by ringing the parties, advising them of the legal requirements, and sorting the situation out. However, there were some requirements the Tribunal could not fix. For example, if the application was out of time for no good reason, it would have to be struck out.[133] For the Employment Tribunal to remedy the situation there had to be exceptional circumstances.[134] Depending on the nature of the irregularity, adjudicators might raise the matter at the beginning of the hearing, leave it to the parties to sort out, adjourn until it was remedied, or simply hear the case anyway.

A number of adjudicators specifically commented on the requirement that respondents' had to be informed that an applicant was legally aided due to legal cost considerations with legally aided parties usually not having costs awarded against them. Twelve adjudicators said that this was irritating if the error was committed by an experienced representative or lawyer. Additionally, one adjudicator stated that lawyers not disclosing client legal aid status should pay costs or be referred to the Law Society, while another adjudicator said that decisions would be referred to the Legal Services Agency. Four adjudicators said that under the exceptional

[133] *Employment Contracts Act 1991*, s 33.
[134] Ibid. For a discussion on the 90 day rule, see Chapter 2.4.1.

circumstances rule, this might result in costs being awarded against a legally aided party.[135]

The responses demonstrated that sometimes parties, depending upon the experience of representatives, did not necessarily adhere to specified procedural rules, this caused adjudicators to spend time on resolving procedural/legal deficiencies in a variety of ways that sometimes caused delay or cost implications. In general terms adjudicators said they practiced tolerance in response to such deficiencies and they tried hard to not let them affect the parties' claims; the exception being when representatives' behaviour could be sanctioned in other forums.

6.5 Category 2: Types of Personal Grievances

The second group of questions related to the types of personal grievances that parties took and how this affected adjudicators' attitude to both the parties and the personal grievance itself.[136] The type of personal grievance may have had an impact on how the adjudicator either perceived the personal grievance or the parties to it. As discussed above, it was possible for adjudicators to vary the adjudication hearing procedure in a fair manner.[137] Therefore, it was of interest to determine whether adjudicators varied their hearing of cases depending on the nature, type, or sensitivity of the personal grievance.

All adjudicators interviewed said that in general terms they would not alter the procedure due to the type of personal grievance. Seven adjudicators said that they

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[135] See Chapter 2.4.3(d).
[136] For categories of personal grievances under the *Employment Contracts Act 1991* see Chapter 2.3.3.
[137] *Employment Tribunal Regulations 1991*, reg 49(2).

might change the procedure in sexual harassment cases to have more sensitivity, with one adjudicator saying that they would seek to make the hearing a 'safe' environment. Four of these seven adjudicators were female. One adjudicator said that the type of personal grievance would not consciously affect the hearing of the case.

Two adjudicators said that they might vary the procedure in discrimination cases, while two other adjudicators said that the type of evidence presented rather than the type of personal grievance might affect their hearing of the case.

Under the *Labour Relations Act 1987*, special procedures had been introduced for workers wishing to take a personal grievance on sexual harassment grounds.[138] The special procedures permitted the mediator to take more of an inquisitorial role. The complainant and respondent would be heard individually by the mediator. Complainants could have their support organisation with them (and usually did), but it was never necessary for the complainant to face the alleged harasser. A 1991 Ministry of Women's Affairs study indicated that most women preferred the *Labour Relations Act 1987* personal grievance procedure rather than that under the *Human Rights Commission Act 1977* when faced with sexual harassment.[139] This was because the Commission did not at that time encourage a person to have the support of a union or other representative with them during an investigation. The impact of this was an employee frequently felt vulnerable and unsupported when making a personal

[138] From the writer's direct employment experience with the Human Rights Commission as a complaints officer, 1994–1996. For a discussion on the *Human Rights Act*, see Chapter 2.4.5 and 2.3.3(d).
[139] Lesley Haines, Director, Policy for Chief Executive, Ministry of Women's Affairs, Briefing Paper for the Minister, *Sexual Harassment Procedures – Employment Contracts Act*, 14 August 1991, 1.

complaint to a stranger.[140] The special procedure that was provided for in the *Labour Relations Act 1987* was not included in the *Employment Contracts Act 1991,* which meant that a sexual harassment complaint was dealt with in the same manner as any other type of personal grievance. The then Minister of Women's Affairs, Jenny Shipley, asked the Minister of Labour to revise this process and to reintroduce the special process for sexual harassment cases. This request was not acceded to.[141]

As the procedure for hearing sexual harassment complaints had been altered by the *Employment Contracts Act 1991*, adjudicators' attitudes to sexual harassment claims were of particular interest. Three adjudicators advised that they had heard no sexual harassment claims, and of those three, two advised that they would be sensitive. Sixteen adjudicators advised that they would take a more sensitive approach in sexual harassment cases. Of those 16, six of the adjudicators were female. This is a high percentage given that only seven of the 21 adjudicators interviewed were female. Adjudicators indicated that there were a number of ways in which they could show sensitivity including: controlling bullying representatives; taking a case management approach; talking to counsel beforehand; asking representatives if they wanted any special arrangements; altering the room set up; taking adjournments; being more interventionist; monitoring cross examination; being more aware of people's reactions; being sympathetic; taking more time; making people feel as comfortable as possible and sensitising oneself to the issue.

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[140] W Davis, *A Feminist Perspective on Sexual Harassment in Employment Law in New Zealand,* New Zealand Institute of Industrial Relations Research, 1994.
[141] Sexual Harassment Procedures – *Employment Contracts Act 1991*, Ministry of Women's Affairs; Letter of Minister of Women's Affairs to Minister of Labour, 1991.

Two adjudicators indicated that they would show sensitivity or vary the procedure in any case that needed it, not just sexual harassment claims. Similarly another adjudicator said that they would show sensitivity to the issue rather than the type of personal grievance. It was also noted by another adjudicator that the adjudication procedure itself was bad for sexual harassment cases and that the investigative process of the current Employment Relations Authority was better. One adjudicator said that they would not take a more sensitive approach to sexual harassment claims because the regulations did not distinguish between different types of cases.

> I don't go in to a hearing thinking this is a sexual harassment claim [and] I must approach it differently. The regulations don't distinguish between types of cases. In one case…at the last minute one of the counsel of one of the parties wanted us to arrange screens and all sorts of things. And we said well that's your problem…you should have given us plenty of advance notice because we can't arrange all this stuff in the time frame you've given us. That could be said to be an insensitive approach but the reality was they didn't give us the time.

In theory, it was possible for adjudicators to take a more sensitive or varied approach if the circumstances of the case or cause of action required it, by allowing the applicant to give evidence without the respondent being present and vice-versa, and for a continuing discussion on elements of the issue to be carried out without the two parties actually meeting one another.[142] However, it was at adjudicators' discretion whether they varied the procedure in certain cases, and the sensitivity of the adjudication procedure could therefore have depended on which adjudicator heard the case.

Under section 40(1)(d) of the *Employment Contracts Act 1991*, where the Tribunal had found that there was sexual harassment at a workplace, the Tribunal could make recommendations to the employer concerning their actions and any rehabilitative

[142] See above for discussion on how the hearing procedure could have been adapted by mediators in claims of sexual harassment.

action to be taken toward the grievant. Seven adjudicators stated that they had not made recommendations because they had not conducted a case that required them (i.e. a sexual harassment case). Of those adjudicators who had heard sexual harassment claims, their views were quite evenly divided as to whether they would make recommendations, with six saying they would, seven saying they would not, and two saying they would make 'comments'. Some reasons given by adjudicators for making recommendations were to ensure employers set up procedures to avoid sexual harassment, to have an impact on future conduct, and to get the employer up to best practice. Adjudicators also said they would make recommendations where it would be of practical value, where parties asked them to, or where there was a particular problem. Of those adjudicators who said they would not make recommendations, the reasons for not doing so were that there was a risk of it being taken the wrong way, it was not their role, the employer generally knew exactly what to do, it was unfair because there was no chance for the employer to respond, and there was no point as 'recommendations have no teeth.' One adjudicator commented:

> I hoped that what I said might have some sort of impact on the way the employer looked at women in the workplace and how other staff in the workplace conducted themselves in relation to women employees, that looking at setting up procedures for dealing with sexual harassment might stop these sorts of situations arising. I mean, the power was there. I used it because I was hopeful it would have some sort of beneficial effect.

The responses were widely divergent mainly by gender on the issue of process with the clear implication that the allocation of a more sensitive adjudicator could have resulted in a more flexible approach being adopted in what might be traumatic or sensitive circumstances. Adjudicators appeared to wrestle with the tension of deciding to not appear biased by adhering to normal process whilst arguably not balancing this by taking special contextual factors into account.

6.6 CATEGORY 3: PARTIES TO PERSONAL GRIEVANCES

The third category of questions related to parties, and whether certain characteristics of parties affected adjudicators' approaches to the parties or to the personal grievance. Possible characteristics that might have affected adjudicators' attitudes included the occupation of either party. For example, if the applicant was in a more senior position, were adjudicators more sympathetic to their claim? Similarly, did the nature of the work itself or the industry in which the personal grievance arose impact on the attitude of the adjudicator or on remedies granted if the personal grievance was successful? Another factor which could have had an impact on the attitude and consequences of adjudication was the approach of the adjudicator to the gender of either party. For example, did adjudicators take a more lenient approach if the applicant was female? The social status of either party or their ethnicity may also have had an effect on how the adjudicator either viewed the parties or the personal grievance itself. For certain types of occupation, gender may have had a significant effect on the nature of the problem while the ethnicity of either party could have impacted on the sensitivity to either party or the personal grievance itself. A further issue which could have impacted on the approach taken by adjudicators was the disability of either party. It would have been paramount for adjudicators to set preconceived ideas regarding the effects of disability aside, but for them to feel free to ask questions, or if necessary to seek advice if further information was required. Another issue that was of interest in relation to parties was a possible power imbalance between employer and employee. In most instances the employer who retained the services of the employee and had the available option of terminating employment, clearly had the potential to create a power imbalance. Another

consideration was instances where there were multiple applicants, which could have caused adjudicators practical difficulties. Further, the frequent reappearance of parties could have caused irritation to the adjudicator and may have had a possible impact on the ability of an adjudicator to work in a neutral fashion.

6.6.1 POWER IMBALANCE

It was possible to take the view that there was a power imbalance between the employer and employee in a personal grievance and the general employment situation. If this view was subscribed to, it could have had an impact on the manner in which adjudicators conducted adjudication hearings and may have affected if and how remedies were awarded. To examine whether this risk existed, adjudicators were asked whether they perceived that a power imbalance existed, and if they did take that view, what measures they took to remedy the situation.

All adjudicators agreed that there was a power imbalance between employers and employees within the Employment Tribunal framework. Intuitively, there is a power imbalance due to the nature of the employment relationship. Adjudicators commented as follows:

> There are power imbalances there and they're simply fundamental to the employment relationship. That's why you have a personal grievance remedy, which is an employee's remedy … So I think it's like the difference between cats and dogs, the difference between employer and employee. There is a power imbalance inevitably. In economic terms, the employer controls the ability to employ people and retain them in employment; has the job employees want.

> No of course not. That may be a matter of philosophical or political belief. In the workplace there is a power imbalance. In the legal situation there is a power imbalance.

> I don't think that the statement that there's a power imbalance between employer and employee is a correct analysis of it. I think when you have a legal process, adversarial process… that the economic base of each side will reflect their ability to deal and handle with the issues, so, if you assume that employers are always wealthier than employees, then you

> might accept that, but that isn't always the case: organised labour versus a small employer. So on an economic model, it's a question of fact in each case, and you might make generalisations. Now if we look at it within an Employment Tribunal framework, it is a matter of resources, classically, an ill-educated person who cannot articulate their side of the argument who can engage a QC who can will do better than a well educated employer who can articulate their argument who acts for themselves.
>
> No. There are a range of power imbalances that can occur in the employment relationship. Whether the person is legally aided creates a power imbalance against the employer but of course the employer has the way and the means to prolong litigation and make litigation worse for applicants. It is in that regard that I've always taken the view not to be overly legalistic, to cut through what I might perceive as being attempts to delay proceedings or to litigate at a very high technical and legal level. And in cutting through that hoping that the power imbalance can be addressed in the nature of the hearing itself. Principles of fairness and natural justice should ensure that the power balance at least in the hearing is equal or balanced.
>
> I think the only power imbalance there was access to senior and experienced representatives. Or in the sense that the competent, good representatives, and there might be a sheer inability to access information about who is good. It's not necessarily just cost. Because for example there are some quite good lay advocates, and there are some absolutely terrible ones. And an Applicant is just not going to be in a position to know who's good or who's bad. And employers will be in a better position, although small employers aren't. Small employers will go, they've got the same problem at another level. Where the power imbalance is, is the big companies who can afford good representatives.

These comments show that some adjudicators took the view that there was a power imbalance in the employment relationship between employers and employees. However, in relation to the Employment Tribunal situation, it appears that a reoccurring view was that the inequality related to the standard of representation. On the one hand, employees may have qualified for legal aid and therefore had the ability to re-appeal provided they met the criteria for the allocation of legal aid.[143] But on the other hand, employers may have had the ability to retain competent counsel who could have served their interests well. Another possibility from the comments received, was that small employers may have found the level of compensation required of them difficult to comply with, particularly if they were small employers with low income and turnover thresholds.

[143]For a discussion on the availability of legal aid, see Chapter 5.4.8(a).

In summary, adjudicators therefore acknowledged that any power imbalance revealed itself in two main ways:

- There was an economic power imbalance between employers and employees. This could have been where employers had more money than employees; or conversely, employees may have had legal aid and consequently the economic imbalance was reversed as the party in receipt of legal aid had their legal costs met; thirdly, small employers could be vulnerable as they may not have been in a strong position to pay for the legal process in terms of representation and/or time.
- Adjudicators identified that there was potentially a representational imbalance. In theory, if both parties were represented there should have been no imbalance; however, some parties were not represented, or alternatively both parties may have been represented but the standard of representation may have had varying levels of competence. In other words, 'there are some quite good [representatives] and there are some absolutely terrible ones.'

In discussing the relative disadvantage between the employer and employee, Linda Dickens identified that employees had a relative disadvantage to that of the employer due to their relatively inferior resources compared with employers generally. This relative disadvantage affected the employees' ability to prepare and present their case. Further, the employer would have been more likely to have had experience of dealing with the officialdom and bureaucracy inherent within the Employment Tribunal system.[144]

6.6.2 Correction of Power Imbalance

Adjudicators were asked: if they believed a power imbalance existed between the parties, what steps they would take to remedy the situation? Adjudicators said that

[144] See L Dickens, M Jones, B Weekes and M Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (1985) 85-7.

they applied the principle contained in *Employment Tribunal Regulations 1991*, reg 49(2), where it was stated that adjudicators had the discretion to intervene at any stage in any proceedings in a manner that was fair.[145] In applying this principle, adjudicators indicated that they would: influence the atmosphere; intervene; aid unrepresented parties; and generally run a fair and transparent process. For example, if surprises were sprung on one party, it may have been appropriate to allow an adjournment to permit consideration by the other party. In general terms, adjudicators indicated that: 'principles of fairness and natural justice should ensure that the power balance *at least in the hearing* is equal or balanced'. Adjudicators believed they achieved this by ensuring the adjudication was run in a transparent and fair manner, making sure that everybody had a full opportunity to have their say even if they were 'stumbling or whatever. Take the time. Don't rush it. Let them feel they've had a decent hearing and give the decision with reasons so even if they are disappointed they won't be disgruntled.'

6.6.3 Class Actions

Adjudicators were asked if in cases where there were multiple applicants, it would have been more effective for class actions to have been brought.[146] Responses from adjudicators were varied. Some adjudicators said it would have been a good idea with others saying that it would not.

6.6.4 Effect of Occupation of Parties

As the substantive questions being considered in this thesis related to whether the adjudication system under the *Employment Contracts Act 1991* worked and what

[145] See para 6.4.8 and Chapter 2.4.3(c) for a discussion of reg 49(2).
[146] See Chapter 5.4.2 for a discussion on multiple claims.

peoples' experiences were using it, adjudicators were asked whether the questions they asked and the approach they took varied depending on the occupation of the parties.

- Seven adjudicators said that they did not vary their questions depending on the occupation of the parties.
- Five adjudicators said no they did not vary the questions but qualified this response by saying that the questions they asked were based on their perception of the person; for example, questions asked of the parties would be varied depending on the ability of the parties to understand.
- Eight adjudicators stated that they did adjust their approach and the questions asked depending on the occupation of the parties. Those adjudicators advised that they would adjust their communication style so that they would be communicating at the same level of the person concerned. Adjudicators commented that they always attempted to clarify issues, for example it was always important to use clear language and short questions at all times.
- Only one adjudicator identified differing levels of obligation or responsibility of the parties depending on their occupation, for example a medical doctor would have significantly higher levels of responsibility in particular areas of work.

Some of the responses received from adjudicators did not precisely answer the question, but rather focussed on the approach they took depending on the capacity of the parties concerned.

In a similar vein, adjudicators were asked whether the occupation of an applicant affected their views of the seriousness of the action complained of. For instance, would the misconduct of a pilot or doctor be viewed more seriously than the misconduct of a cleaning worker or shop assistant? The majority of adjudicators (14) said no. Three adjudicators said yes, as they recognised that certain occupations

carried more responsibility. One adjudicator did recognise that the occupation of the applicant was likely to affect the level of compensation awarded.

However, reference to Chapter Five indicates that the occupation of the parties did affect the outcome of a decision. For example Tables 5.18 and 5.26 illustrate that those in the professional and management categories had a higher rate of success than employees in other occupational classes and secondly, employees in those occupational classes were awarded higher levels of compensation.[147] Therefore, reference to Chapter Five has illustrated that there was a possible unexplained statistical link between the occupational class of the parties and remedies granted.

6.6.5 Effect of Gender on Responses to Adjudicator Questions

Adjudicators were invited to make general comments about the types of responses they received from female and male parties in the personal grievance adjudication process. That is, the nature of the behaviour of the parties and the answers they provided to questions and methods of giving evidence. In general terms adjudicators commented on the differing nature of responses between males and females, with one adjudicator stating:

> I'm very aware that in very general terms men are outcome focussed and women are relationship focussed. This can affect even the remedies they're looking for, certainly in mediation, and they affect both their communication styles and their presentation.

In response to the above question adjudicators commented on the responses received from males and females by saying that females could have been more vicious; more emotional, as opposed to the 'kiwi bloke'; focussed on relationship; were more sensitive to criticism; and more articulate. They indicated male parties tended to be

[147] See Tables 5.18 and 5.26 and accompanying text.

more focussed on outcome; more literal in their answers; made more unreasonable claims; had more entrenched views; and tended to struggle to express themselves.

This information indicates a perception that females' responses to adjudicator's questions tended to be more emotionally focussed and attempted to explain the situation. Male responses tended to be more literal with a stronger focus on outcome.[148] The male approach appears to have been less flexible taking a more literal approach to answering questions which suggests that female respondents may have been more suited to a potentially more flexible mediation approach to resolving personal grievances.

6.6.6 Effect of Membership of EEO Target Groups on Adjudicator

Equal Employment Opportunity Target groups were recognised in s 56 of the *State Sector Act 1988*. In that section, as part of the good employer obligations contained in the Act, all Public Service Chief Executives were required to put in place equal employment opportunity programmes and to recognise the aspirations of these groups in their employment. The groups listed included: women; Maori; ethnic or minority groups; and people with disabilities.[149] It should be noted that there has never been equivalent provision in employment related legislation covering private sector employers although employers could not discriminate against employees for belonging to membership of any of the above target groups.[150]

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[148] These descriptions of male and female attributes are all taken from interviews with Employment Tribunal Representatives, thirty of whom participated in interviews. Recordings of the interviews and computer transcripts are in the possession of the author.
[149] *State Sector Act 1988*, s 56.
[150] See *Human Rights Act 1993*, ss 21–23; *Employment Contracts Act 1991*, s 28. Importantly, the provisions contained in the *Employment Contracts Act 1991* did not prohibit discrimination on the ground of disability, in those circumstances an employee would have been required to take a

During the interviews, adjudicators were asked if they had difficulty disregarding social status, gender, ethnicity, or disability of the applicant. Six adjudicators said that, no, they did not have difficulty in disregarding these factors when making a decision. Other adjudicators commented that they did not have difficulty setting these matters aside, except in circumstances where they were relevant. One adjudicator said 'you have to make allowances for communications style'. Therefore it was necessary for adjudicators to take the applicants 'as they were' as styles or procedures etc may have been required to be amended depending on the circumstances. Two adjudicators said, yes, they did have difficulty setting these matters aside as you have to be aware of biases and try not to be influenced by them. One adjudicator remarked:

> The way I look at this job, and I know some of my colleagues in the Tribunal would not have agreed with me, I think if you come to a job like this everybody's got their own personal bundle of biases, and inevitably you do. That's one of the things of being human – you've got a certain amount of baggage. We all have. And for me the challenge is trying to be aware of my own baggage, but I'm sure that there's times when it has an effect. Because it's not when you're aware of it when it's a problem, it's when you're unaware of it. I'm sure if I see a woman of about my age with two kids and struggling to balance the family and do a job and your employer gets cross because you won't work late one night, I'm going to feel a big pang of sympathy for that woman because I relate to what she's going through… You can say "Oh my goodness we're well qualified, we've got good CVs, we're paid a lot of money to be unbiased." I think it's actually quite important to acknowledge that we've all got biases and try to be aware of them so that you don't fall into the trap of being influenced by them.

6.6.7 Effect of Reappearing Parties

On occasion applicants had a tendency to appear in multiple claims for personal grievances. Likewise, there were instances of employers repeatedly appearing in personal grievances against them. Adjudicators were asked if particular employees or employers appeared frequently before the Tribunal whether this affected their attitude in either the hearing process or their decision making. Ten adjudicators stated that

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discrimination claim under the *Human Rights Act 1993* unless the problem fitted under another head of grievance contained in the *Employment Contracts Act 1991*.

reappearing parties did not affect either decision making or the adjudication process while ten adjudicators acknowledged that it did. Adjudicators further commented that the effect of reappearing parties was to create a feeling of initial bias, but then the adjudicator would deal with the case on its merits. They further commented that reappearing parties would create a loss of credibility to the parties concerned and would be an indication of behavioural patterns of the parties. Some adjudicators also remarked that reappearing parties would have an effect on awards of costs. In contrast, other adjudicators stated that reappearing parties were inevitably only larger employers and that they simply had to deal with each case on its merits.

These comments indicated that there were circumstances where reappearing parties would have affected the attitude and behaviour of adjudicators. This could have resulted in an advantage for employees of employers who reappeared often, potentially affecting the judgment of the adjudicator and consequently the outcome of the personal grievance. Adjudicators may have assumed a pattern of behaviour on the part of the employer and may have tended to disbelieve their evidence. It is possible that adjudicators would have taken the view that reappearing employers had not 'learned by their mistakes.' Likewise, reappearing employees may have been seen as a nuisance to adjudicators resulting in their claim being viewed with a level of scepticism which under the circumstances could have been reasonable, however the extant personal grievance may still have been justified.

6.6.8 Effect of Membership of Target Groups on Representatives' Approach to Witnesses

It was possible that membership of specific groups may have affected how representatives approached both parties and witnesses. If there were perceived

differences observed by adjudicators it may have affected how representatives treated both parties and witnesses resulting in a variation of outcome. Adjudicators were therefore asked whether they perceived any such differences. The responses of adjudicators can be generally summarised as follows:

> There is quite a marked range of politeness and skill displayed by representatives in their treatment of witnesses and they range across the spectrum of being rude, poorly skilled at cross examination to those who are excellent in terms of how they deal with gender, ethnicity, disability or social status of the witnesses; and representatives who show extremely courteous cross-examination and courtesy towards people just as individuals to those that are appalling. I guess that is across the range of our society and it's represented in the court room.

6.6.9 EQUAL OPPORTUNITY TRAINING

As adjudicators would have been required to communicate effectively with representatives, parties and witnesses from varying types of backgrounds, they were asked whether they had had any training in the areas of cultural protocols, disability or gender issues. Adjudicators advised that they had very little formal training. One adjudicator commented that they had received self training by way of communicating with other adjudicators, with another adjudicator remarking that training had been promised but had not transpired. This could have impacted on either parties or witnesses in the hearing situation. However, most adjudicators have acknowledged earlier that they did have the ability to adapt the hearing procedure and if necessary to take various issues and EEO requirements into account. One adjudicator shared the following views:

> I'll put this on the record. The Department promised much and delivered nothing… It was always, "No, we haven't got any money this year for this." I mean they didn't provide money for us to meet as a group or any professional development at one stage for three years. For a professional organisation the training in the Employment Tribunal was an absolute disgrace …The Employment Tribunal Members tried to get training, professional training on mediation involving a lot of these things (gender issues and cultural protocols etc) from an acknowledged international. No. Stall, stall, stall, stall, stall. The Employment Tribunal was abolished. The Mediation Service was established under the Labour Department as an

> employee and within one month they had this very training that we'd been seeking for five years. It was just a disgrace.
>
> …I'd have to say in Wellington we did a lot of work internally. We used to meet every couple of months and do our own internal training. We would normally have six days a year, but the other offices didn't do that at all. …But in these sorts of general areas nothing was done…it's just very irritating.

Where power imbalances were acknowledged by adjudicators they demonstrated awareness of this and used various tools to redress imbalances including discretionary intervention. Parties were able to adopt a variety of strategies to contain costs and reduce delay by the use of approaches such as class actions but no trends were discernable due to the small sample size.

Adjudicators demonstrated a good awareness of occupational and social background differentials of applicants and gender, ethnicity and disability factors. Despite adjudicators requesting it, this however, did not appear to be supported by appropriate professional training on specific awareness of diversity issues.

6.7 CATEGORY 4: REPRESENTATION

The fourth category of questions for adjudicators related to their perceptions of representation. Prior to the passage of the *Employment Contracts Act 1991*, personal grievances could only have been taken by union members. In these circumstances, union advocates or legal representatives commonly represented applicants.[151] The *Employment Contracts Act 1991* stated that all employees who were bound by an

[151] *Labour Relations Act 1987*, s 216. Provided that personal grievance procedures were required to be contained in all awards and agreements by s 215(1) shall be available for use by persons who: at the time the personal grievance arose were covered by the award or agreement and; at the time when the union was requested to pursue the grievance were union members; (2) provided that where a worker was not covered by an award or agreement but considered they had grounds for a personal grievance the worker had the right to submit the grievance if at the time the grievance was submitted the worker was then a member of the union that had coverage of the work which the worker was performing at the time the grievance arose.

employment contract which contained the personal grievance procedures had access to personal grievances.[152] This meant that all employees were entitled to take a personal grievance should the situation arise; the option was not restricted to union members. As a result many employees who were not union members, for the first time took personal grievances and chose to be represented by barristers and solicitors.[153] As legal representation appeared to have been much more prevalent using this system, of note was whether or not adjudicators believed that the standard of representation was adequate.

6.7.1 EXPERTISE OF REPRESENTATIVES

Adjudicators were first asked if they perceived any varying levels of expertise between union advocates; advocates; counsel; and self representatives. Questions related to varying standards of representation, what the attitudes of adjudicators were to poor representation and whether they assisted in such cases. Adjudicators were also asked about the standard of self-representation and whether they made special attempts to assist parties who represented themselves. Ideas were sought from adjudicators as to how the standard of representation could be improved and whether poor presentation standards affected adjudicators' attitudes to either the case itself or its defence. Adjudicators said that, yes, there were varying levels of expertise between union advocates, advocates, counsel and self representatives. All adjudicators stated that there were huge levels of variation across the spectrum. However in contrast, one adjudicator commented that there was no one group which was better than another, the rule being that good advocates were where you found them. One adjudicator stated:

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[152] *Employment Contracts Act 1991*, s 33(1).
[153] For a discussion on legal representation, see Table 5.10 and accompanying text.

> Yes, but the joke of it is not necessarily between those as groups but within the groups. Qualified counsel frankly, how the hell do they get their degree? Some of the Counsel horrify me… You get one or two good ones but sadly not that many.

6.7.2 POOR REPRESENTATIONAL GROUP

Adjudicators were then asked if they believed that there was a particular group of representatives who they perceived as not doing a good job. Replies to this question were varied, but affirmative responses included:

- Yes: young and inexperienced;
- Yes: old and experienced without a decent background in law;
- Yes: union representatives and self representatives are the worst;
- Yes: union advocates and contingency advocates;
- Yes: self representatives;
- Yes: the 'Not so good' lawyers;
- Yes: legal profession;
- Yes: union representatives;
- Yes: green incompetent lawyers;
- Yes: contingency fee people – 'maximum money for minimum effort'.

Other adjudicators did not take the view that there was one group of representatives who were particularly poor:

- No: it is within groups, not a particular group;
- No: it is individuals;
- No: apart from self representatives.

Clearly, these comments show that the majority of Employment Tribunal adjudicators were stating that there were varying levels of representational standards. All groups from which representatives originated were identified by some adjudicators as providing varying levels of representational standard. It is therefore not clear from the responses to this question as to which group adjudicators believed provided the highest standard of representation.

6.7.3 RAISING THE STANDARDS OF REPRESENTATION

As the above question showed varying views of the standards of representation and varying levels of acceptance of that standard, the next question therefore focussed on how the standard of representation could be maintained or raised. Adjudicators had many varying ideas on how this could be achieved, some adjudicators focussed on education for representatives, including a return to the system which operated when the *Union Representatives Education Leave Act 1986* was in force, some suggested improving university education to include competencies on representational skills. Another approach was to introduce minimum standards with an organisation such as the Employment Law Institute regulating the standards.[154]

6.7.4 ALLOWANCES FOR POOR PRESENTATION

Bearing in mind the potentially varied response which may have been received from the above question, adjudicators were asked whether they made allowances for poor presentation.

Table 6.9: Do you make allowances for poor presentation?

Adjudicator Response	**Number of Adjudicators (N = 19)**
No[155]	2
Yes	3
Yes for self-representatives	3
Yes in all circumstances	9
Yes for junior representatives	1
Yes based on the morality of the case	1

[154] The Employment Law Institute was established in 1997 by employment law specialists as a result of the increasing demand for legal representation in employment cases (telephone discussion with Secretary of the Employment Law Institute, 7 July 2005). For a further discussion on the Employment Law Institute see Chapter 5, n 109 and related text

[155] One adjudicator said that poor presentation would have been represented in costs, with the other stating that poor presentation was not taken into account; that this was set aside and the adjudicator focussed on the issues in the case.

Table 6.9 shows that a clear majority of adjudicators took poor representation standards into account (with only two saying that they did not) when attempting to clarify the facts or evidence being presented in a claim. The standard of representation could well have been an access issue for either applicants or respondents, with employees perhaps being obliged to use union representatives, representatives funded by legal aid or either advocates or counsel with little experience or expertise consequently costing less.[156] Those surveyed commented as follows:

> I go back to being driven by the morality of the case again.
>
> If it's someone who is undeserving getting the shitty end of the stick I'll let it happen. So it's very moralistic. Not very scientific.
>
> If it's going to result in a screaming injustice I may try to manipulate things to go the right way.

6.7.5 Different Approach for Different Types of Representatives

Adjudicators were asked if they took a different approach to dealing with poor representation situations depending on whether the representative was an advocate, union advocate, counsel or the party was self represented.

Table 6.10: Different Approach for Different Types of Representatives

Adjudicator Response	**Number of Adjudicators (N = 17)**
No	4
Yes for self-representatives	9
Perhaps – following assessment of the level of advocate's skill	4

Table 6.10 shows that adjudicators would not generally take a different approach to dealing with evidence adduced by different types of representatives. However, the

[156] See Tables 5.10 and 7.2.

majority of adjudicators were prepared to take a more active role where self representatives were involved. In other circumstances, it appears that adjudicators were most concerned with obtaining the evidence rather than dealing with difficult standards or poor representation. This information was collected from interviews with Employment Tribunal Adjudicators who spoke of the methods they used to bring forward relevant evidence.[157]

6.7.6 Style and Standard of Self Representatives

As only a small minority of people chose to represent themselves in personal grievances, it was not possible to determine in what manner adjudicators dealt with the varying situations they became involved. Adjudicators were asked if they noticed a difference in presentation style and standard depending on whether the self represented person was an applicant or respondent. Only one adjudicator said yes, that they noticed a difference in presentation style and standard. All others said no, there was no difference whether the self representative was an applicant or respondent, with two saying that they thought that self represented respondents were more organised and identified that the higher onus on the respondent to justify their decision made some difference. Two adjudicators identified that lack of legal education could make a difference with one adjudicator commenting that a little legal education could cause more significant problems 'the worst ones were those with a little bit of legal knowledge who thought they knew it all.'

6.7.7 Guidance of Self Representatives

Adjudicators were asked if they tended to guide a self represented party or did they take a more relaxed approach to legal requirements and process? One adjudicator said

[157] Interviews held with Employment Tribunal Adjudicators are in the possession of the author.

that they would do both things, that is help with questions and have a dialogue. Another adjudicator said that they allowed the self representative to present the case how they wanted to but required them to adhere to basic procedural guidelines. Seven adjudicators said that they took a relaxed approach when self representatives were involved, with nine adjudicators acknowledging that they did guide self representatives through the process, particularly in relation to questions.

6.7.8 Assistance for Incompetent Lawyers

When lawyers were perceived to be incompetent, adjudicators were asked if they assisted or guided them. In response, six adjudicators said no, five adjudicators said that they would discuss it with the lawyers if they were asking questions, five said that yes, they would assist but not to the same extent as they would self representatives. One adjudicator said:

> Yes. If a lawyer is simply new to the experience he or she will usually appreciate guidance. If on the other hand and I'm talking about very rare cases the lawyer is both incompetent and arrogant it's a difficult situation for everyone. Anecdotally I've added a little maxim here that mad lawyers and mad clients find each other like iron filings drawn to a magnet.

> Assist or guide to the extent that it's not responsible of me to allow their confidence to destroy the validity of the proceedings. That's the danger. You've got to do that. Also you assist and guide to the extent that you make it clear to them what it is that you want from them without telling them how to run their case or running it for them. You make it clear to them what you think you need.

> To a degree. If the lawyer simply doesn't know that he has to put a case or if he doesn't know how to put an open ended question in the examination in chief then certainly I'll interrupt and I'll take the initiative and I'll explain what I require. If he keeps on doing it I'll keep interrupting. And sometimes I might take a break and take counsel out and just have a quiet chat with them.

6.7.9 Inexperienced and Incompetent Lawyers

Adjudicators were asked whether they would guide an inexperienced and incompetent lawyer. All adjudicators advised that they would offer some assistance to

inexperienced lawyers. How they would assist varied to some degree between offering assistance during the hearing or taking the lawyer out of adjudication to provide advice. All adjudicators had no tolerance for incompetent lawyers, with one stating that it was the role of law firms to train their staff. One adjudicator said:

> Yes to a degree. Everybody has got to start somewhere. You've got young inexperienced lawyers coming in. It's unreasonable to jump on their head and expect them simply because they happen to be qualified to be expert so you give them rope without compromising the proceedings. In other words you don't humiliate them you don't embarrass them. You try to take them gently through the hearing.

6.7.10 Effect of Presentation Standard on Attitude to Claim

The question was asked as to whether the standard of presentation of the claim affected the attitude of adjudicators to the claim or its defence.

Table 6.11: Do Presentation Standards Affect the Outcome of the Hearing?

Adjudicator Response	**Number of Adjudicators (N= 17)**
Yes	2
No	6
'No' in theory but 'Yes' in practice	9

This table represents adjudicators' responses to the question 'Do Presentation Standards Affect the Outcome of the Hearing?' This question was listed in NUD*IST as a question that was asked in the interview. The answers given were very clear as to whether they were yes or no, or in theory no but in reality yes. Table 6.11 shows that, in theory, the roughly half of adjudicators believed that poor presentation standards would not have affected the outcome of the decision. Two adjudicators recognised that poor presentation standards could have an impact with six adjudicators clearly indicating that presentation standards had no effect on the outcome. Two adjudicators commented:

> Yes. I have to admit it does. The less confident the case is presented I'm afraid it does have an impact on the credibility of the case. Now I try to put that to one side but I'm conscious that it's there and so I'll try to work to overcome that. It has a corrosive influence.

> I think so yeah. That's the art of persuasion. No doubt about it well presented well argued and this is why some advocates and lawyers get paid a lot more than others in the litigation sense. Because they do present so well they actually persuade; the 40/60 case against becomes a win for one side which shouldn't be or they reduce the remedies. That's what advocacy is all about. The answer is you can only use what is in front of you and if you've got to look to see it look hard at a certain point you're not going to. And that's why it's a game. I say to people "You go to hearings for a decision. You don't go for justice." And the decision maker decides on the basis of the argument and how it's presented. And that determines the outcome. So unless you can get through what the decision should be if you can't present it properly even though you're right, you're going to lose. Cynical but…

Although the question was a closed question, where interviewee's chose to expand on the point, this additional data was included.

Whilst demonstrating a good awareness of the variable factors of poor representation and the potential impact on parties, responses to how this was dealt with greatly varied. Of issue was the negativity in particular to incompetent experienced lawyers and the notion that sometimes no intervention was required to redress this imbalance. Whilst this may have led to variable outcomes the adjudicators' role in an adversarial system sometimes went beyond the requirements of their core function. However it was acknowledged that most adjudicators naturally took a supportive approach to self represented parties. Various recommendations were also made by adjudicators to improve the situation including: ongoing training and more emphasis on minimum standards for representatives.

6.8 CATEGORY 5: COSTS

The cost of taking a personal grievance and the potential for costs to be awarded against an applicant could have resulted in potential applicants being reluctant to

follow the process.[158] It was not always clear from decisions of the Employment Tribunal how adjudicators awarded costs and on what basis Employment Tribunal Adjudicators made their decisions when costs were being awarded. In devising questions on costs, the procedure used by adjudicators for awarding costs was examined and questions derived by looking at both the decisions contained in the database and the hearing procedure itself.

6.8.1 COST OF REPRESENTATION

Adjudicators were asked if the cost of representation restricted access to the personal grievance procedure. Adjudicators agreed that the cost of taking a personal grievance caused problems with accessing the procedure. The reasons why all adjudicators took this view were varied but included;

- People could not get the standard of representation they wanted or deserved depending on the merits of the case;
- The cost of representation restricted access to justice in any institution;
- Some people could not even afford the filing fee;
- It affected access and quality of representation;
- Solicitors' costs, advocates, sometimes union fees;
- Yes, although that was one area where contingency fee people did provide a service where there was not anything;
- Higher costs equals higher risk equals access more in jeopardy;
- If you can get legal aid it's fine but if you cannot and you are poor it's very hard to run a case.

Adjudicators made the following comments regarding the effect of the costs of representation on parties to a personal grievance:

> And I believe, nobody has done the research, but anecdotally I could say that my experiences there is a bigger preponderance of claims now from middle to high paid workers, and a lot less claims from union represented people and lower paid workers than there was. They have got

[158] See Chapter 7.4.1 for the impact of costs on employee representation and Chapter 5.4.8 for a discussion on the costs of representation.

to be a bit careful because the 1991 Act opened the jurisdiction up and made it available to a whole lot more people but I still see what I think is a decreased representation from low paid workers because of (1) their loss of union representation and (2) the fact that when they go along someone says to them "I guess I could take a grievance but it's going to cost you two or three grand and if we lose you might have to pay some costs so you might be up three or four grand." And to a lot of people working on $8 $9 or $10 an hour they don't have that money. Certainly if they've got it they can't afford to risk it. I think it has a significant impact.

Very, very clearly and to the quality that you get quite often too. It's the difference between thinking "I'll go and get this chappy who is a QC who specialises in employment law if I can afford him/her", and thinking "I have to do it myself and I don't really know what I'm doing" particularly if the claim involves legally complex arguments. You're probably at less of a disadvantage if it's a simple personal grievance issue. But if there are difficult legal matters involved then I think you are clearly at a very significant advantage if you've got somebody who is familiar with the law and knows how to present things. It's obvious. Which is why I've always felt that it might be better to have gone back to when the unions had the right to do it, but of course that is never going to happen. Anyway don't tell anybody else that. Unpopular view.

Yeah I think it does. Strangely if you can get legal aid that's fine. But if you're one of these people who can't get legal aid but you're poor you really do hesitate to run the case.

6.8.2 Personal Grievance Costs – A Barrier?

Adjudicators were asked if they thought that the cost of lodging and bringing a personal grievance was a barrier which prohibited people from having access to the Tribunal.

Table 6.12: Are costs a barrier to pursuit of personal grievances?

Response of Adjudicator	**Number of Adjudicators (N = 16)**
Yes	7
Yes but dealt with by contingency representatives	2
No	1
No when compared with fees charged elsewhere such as the Disputes Tribunal	1
No – costs, yes – representation	4
Complexity of procedure more of a barrier	1

The clear majority of adjudicators said that the cost of taking a personal grievance was a barrier to using the procedure. One adjudicator recognised that fees for lodging a personal grievance were not unduly high but that there were fewer claims from low paid workers, which indicated that fee levels were a barrier to low paid employees who may have wished to take a personal grievance. A minority of adjudicators did acknowledge that costs were a barrier to using the procedure but believed that these circumstances could have been dealt with by contingency representatives. However, it has to be taken into account that, anecdotally, 'No Win, No Fee' representatives only tended to take cases which had a strong likelihood of success and were not legally complex in nature.[159] Several (six) adjudicators said that they believed the filing fee was not a bar to lodging a personal grievance, however five had qualifications to this response.[160] Four adjudicators said that the filing fee was not the problem but the cost of representation was. One adjudicator said:

> I don't think the lodging fee has been an impediment and I don't think the initial cost of work by a representative is necessarily an impediment. Representatives can give advice to applicants and respondents and for the applicant and respondent to either go to mediation or come and do adjudication themselves on the basis of the legal advice. The impediment is where the legal profession either quote their bills up front or parties have learnt anecdotally that the costs of legal practitioners are so high that they do not bring cases. I am most certain that it is a big factor as to why people haven't brought cases before the Tribunal.[161]

Therefore over half of the adjudicators interviewed believed that the unavoidable costs such as application fees and representation costs constituted a significant barrier to personal grievance applicants.

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[159] Personal understanding of author after discussion with representatives at Christchurch Community Law Centre.

[160] *Employment Court and Employment Tribunal (Fees) Regulations 1997*. S 3 refers to sch 2 which indicated that the fee for lodging a personal grievance to the Employment Tribunal was $70.

[161] Another adjudicator said that the cost of lodging a claim with the Small Claims Tribunal was more expensive. The Small Claims Tribunal is now the Disputes Tribunal. Section 24(1) of the *Disputes Tribunal Act 1988* provides that a prescribed fee has to be paid when lodging a claim with the Disputes Tribunal, the rates being for claims valued at up to $1000 the fee is $30.00, for claims between $1000 and $5000 the fee is $50 and for claims between $5000 and $7500 the fee is $100. Checking the relevant legislation has found this supposition to be accurate.

6.8.3 FACTORS TAKEN ACCOUNT OF IN AWARDING COSTS

Another potential restriction on taking a personal grievance was the possibility that either the adjudicator might order costs to rest where they fell or alternatively, if the personal grievance was lost, that costs may have been awarded against the applicant. Adjudicators were therefore asked what factors they took into account when awarding costs. A list of factors was suggested to adjudicators which may have impacted on how costs were awarded. These were:

- How the case was conducted;
- How parties acted;
- Significance of case to the parties;
- Preparation time;
- Arguments lacking substance;
- Legalistic/technical arguments;
- Actual costs.

Adjudicators responded as follows:

Factors: re Costs	**Adjudicator Responses**
How the case was conducted	Four adjudicators said yes, if the case was inefficiently conducted and two said yes if it unnecessarily extended the case.
How parties acted	Three adjudicators said yes. Three adjudicators said yes if it made the hearing longer. One said yes if the party was obstructive. One adjudicator said no.
Significance of case to the parties	Three adjudicators said yes. Two said yes but all cases were significant to the parties. One adjudicator said yes but that it was not a big deal. One adjudicator said sometimes. Two adjudicators said no.
Preparation time	Nine adjudicators said yes. One adjudicator said no, that they took a mathematical approach.
Arguments lacking substance	Seven adjudicators said yes if it extended the case. One adjudicator said no that there was usually a grain of good sense in the arguments.
Legalistic/technical arguments	Nine adjudicators said yes if it extended the case.
Actual costs	Four adjudicators said yes. Two adjudicators said that they use it as a starting point. One adjudicator said that this was the most significant factor. One adjudicator acknowledged that lawyers were bad at giving evidence of this. One adjudicator said no that they would work out what was reasonable and take a percentage.

Six adjudicators advised that they would take into account all of the above seven listed factors. One adjudicator said, 'If the case was routine we would just go with that but we would always invite the parties to settle costs'. The award of costs covered a variety of contextual factors, but predominantly preparation time and the length of hearing and whether overall proceedings were deliberately extended determined such.

6.8.4 Self-Representatives and Costs

Adjudicators were asked what their view was of the principle that self representatives cannot claim for the cost of their time.[162]

Table 6.13: Should self-representatives be able to claim for the cost of their time?

Adjudicator responses	**Number of Adjudicators (N = 17)**
Self-representatives should not be able to claim costs of time	5
Self-representatives should be able to claim costs of time	10
Do not have a definite opinion either way	2

Table 6.13 shows that half of adjudicators believed that self representatives should be able to claim for the cost of their time, with five adjudicators taking the contrary view. Two adjudicators did not know whether or not self representatives should be able to claim for their time. The reasons given by adjudicators for supporting the view that self representatives should be able to claim for time included:

- It was grossly unfair that they could not;
- Simply wrong;
- Should be able to on the principles of equity;
- They should be able to as they may lose a couple of days pay;
- They should be able to but how it would be quantified was another issue.

[162] For a discussion on executive time and costs for self representatives, see Chapter 2.4.3(d).

Those taking the view that adjudicators should not be able to claim for the cost of their time said so because:

- It should not differ from ordinary courts where self representatives could not claim for fees;
- Should not be able to claim all time because of inefficiency;
- Nobody else can claim for cost of time.

Adjudicators were asked if they could give examples where it would have been just to award a self representative costs for their time. Adjudicators responded as follows:

- Five adjudicators said that they could not remember any specific examples;
- One said that where the respondent was running their own business they should have been able to claim for cost of time;
- Two adjudicators said that parties who had taken time off work should have been able to recover the cost of time;
- One commented that most self represented cases were quite short so should recover;
- One said they do not normally claim for the cost of time but ask for reimbursement of the filing fee;

Irrespective of the views of adjudicators it is worth noting that representatives would have charged for their time so perhaps to self representatives this would appear unfair. Further, an employee would have been required to use time off from work if they had a representative and if they chose to self represent they would have received no compensation for time. By contrast, other parties who were represented were entitled to claim a proportion of costs incurred.

6.8.5 EXPENSES

It was possible that parties and their representatives may have claimed expenses which were perceived to have been unreasonable or excessive.[163] Adjudicators were

[163] For a discussion on the award of reasonable costs, see Chapter 2.4.3(d).

therefore asked how they determined whether or not expenses claimed were necessarily and reasonably claimed.

Table 6.14: What Expenses are Reasonable?

Expenses adjudicators would allow costs for	**Number of Adjudicators (N = 19)**
Photocopying/Disbursements	3
Travel	2
Filing Fees	1
Any reasonable/necessary costs	11
Expenses proven by invoice	1
Accommodation	1

Table 6.14(a) What expenses are not reasonable?

Expenses adjudicators would not allow costs for	**Number of Adjudicators (N = 5)**
Nothing other than travel/disbursements	1
No extravagances	1
Phone/Travel expenses when a local lawyer could have been hired	1
Excessive mileage	1
Costs that should not have been incurred	1

The answers from all adjudicators indicating what would be allowed appear to be rather arbitrary, with some agreeing to cover the cost of travel while others would not stating that a local representative could have been used. It does, however, appear that if expenses claimed were reasonable there was a strong likelihood that they would have been granted, the difficulty being determining what was reasonable under the circumstances with the possibility that adjudicators may use a different measure of reasonableness.

6.8.6 COSTS FOR EXECUTIVE TIME

On occasion respondents employed their own legal or human resources staff. If those staff members advised and represented the party concerned, their time was described as executive time. Adjudicators were therefore asked how they determined whether or not to award costs for executive time. Adjudicators replied:

- The seniority of the executive was assessed when awarding costs;
- On the facts of the case;
- Look at actual costs and apply the appropriate principles, it would cost respondent less than getting someone else in;
- When the claim was frivolous;
- Depended on the evidence, reasonableness and actual time;
- I'm sympathetic where the employer was mucked around by the applicant or their lawyer;
- Whether or not the role was within their job description;
- I would treat the same as it if were a union, I'd give costs to them;
- Whether it's fair to reimburse;
- Not likely to award unless exceptional circumstances.

Four adjudicators said that they never awarded executive time.

6.8.7 APPLICANT'S OBLIGATION IN OUT OF TIME APPLICATIONS

Out of time applications could have been seen as an inconvenience to employers.[164] That is, if an employee had a personal grievance then they had an obligation to lodge the personal grievance and comply with other obligations on time. It could therefore be seen as slightly punitive to the employer if applicants did not have to contribute to the costs of the respondent if applications were made out of time and leave was

[164] As they may have considered the incident which constituted the grievance occurred some time in the past and had been either resolved or ignored by the employee. However, the 90 day rule meant that anything up to 3 months after the incident, or in exceptional circumstances more than 90 days later, the personal grievance may still have been required to be resolved. By this time employers may have appointed a new staff member in dismissal cases or may have taken some other action which they considered had resolved the situation. For a discussion of out of time applications and when the exceptional circumstances in which the 90 day rule can be set aside, see Chapter 2.4.1(c).

granted to pursue a personal grievance. Adjudicators were therefore asked how they viewed the applicant's obligation to contribute to the respondent's costs in out of time applications.

Table 6.15: Do Applicants have an obligation to contribute to the respondent's costs in out of time applications?

Adjudicator Responses	**Number of Adjudicators (N= 18)**
Case by case analysis undertaken	5
All unsuccessful parties treated the same	3
On the basis of costs	6
Nominal amount to reflect time and trouble taken	1
Must ensure someone is accountable	1
More likely when the applicant fails in their case	1
Never encountered	1

Table 6.15 shows that 6 adjudicators said that whether or not applicants would have to meet the costs of the respondent in these circumstances would have depended on how costs would have been awarded anyway. Five adjudicators said that whether the applicant would be required to contribute to the respondent's costs in out of time cases would have depended on an analysis of the facts and circumstances of the case. For three adjudicators, all unsuccessful parties would have been treated the same way and the 'out of time' element was immaterial. In four cases, only one adjudicator thought that they must ensure that someone was accountable; and one adjudicator said that if the applicant failed in their case they would be more likely to award costs in out of time cases against unsuccessful applicants. One adjudicator said that they had never encountered this situation so could not comment. Clearly the above results

indicate that the most common approach was to determine how costs would have been awarded anyway depending on the success or otherwise of the case.

One adjudicator responded to the above question by saying: 'Someone has to take responsibility for the fact that someone has sat on their bum.' This adjudicator clearly believed that if the reason for not lodging the application within the requisite time was fault or negligence, that person should bear responsibility via costs.

The responses illustrated the manner in which cost factors were assessed varied with no agreed standard approach for instance: some took the view that a party engaged in delaying tactics should contribute more in costs, if claims were pursued regardless of merit 17 adjudicators would punish this by a costs award against the claimant but not all adjudicators adopted the same approach to unmeritorious claims. It is possible from the interviews to suppose that one adjudicators' response that drew the distinction between a morally just or a legally sustainable claim was a widespread view.

6.8.8 NO FAULT IN OUT OF TIME APPLICATIONS

It could have been that the late application was not due to any particular fault or negligence of the employee.[165] Adjudicators were therefore asked if the late application, due to either illness of the applicant or action of the employer, was a factor taken into account. Adjudicators responded as follows:

- Six adjudicators indicated that this was one factor which would have been taken into account;
- Three adjudicators said that this would be an exceptional circumstance which would need to be proven by the applicant;

[165] Ibid.

- Three adjudicators said they had never come across this situation;
- Two adjudicators said this would go to where the responsibility lay, that was, who was responsible for the application being out of time;
- Two adjudicators noted that it would be very difficult to bring a case out of time;
- Two adjudicators indicated that they would be driven by legal principles;
- One adjudicator said that they would not be influenced by late applications.

6.8.9 Costs Against Claims Without Merit

It was unclear from the decisions of the Employment Tribunal how many claims were made to the Employment Tribunal which lacked merit. There was a possibility that unmeritorious claims were using up adjudicators' time and possibly resulting in delays for other applicants who had justifiable claims or personal grievances. Adjudicators were therefore asked if a losing party brings a claim without merit, and despite clear warning has continued with it, do you award costs against that party? Seventeen adjudicators said yes, that they would award costs against this type of party. Of those 17, two acknowledged that they would take into account the financial circumstances of the party concerned. One adjudicator said that it was seldom that you would see a claim totally without merit. One adjudicator said no, that they would not award costs or provide warnings against an unmeritorious party. One adjudicator said:

> It's a factor which you'd take into account amongst other things. Just because a claim's without merit and they've been warned I don't think that's sufficient to say "I'm going to award a huge amount of costs against you". Particularly if the person is unrepresented and they haven't had the means to get legal advice I don't think you should be further penalised because some people can be morally right but not legally right and so I can fully understand why the person thought "I've been really hard done by here" but you can't force it within the legal definition of a personal grievance but yeah you have been treated really badly.

Some adjudicators are therefore stating that they would award costs if the claim lacked merit but acknowledge that there will be a series of other circumstances which

would also be required to be taken into account. For instance, there is little point in awarding costs against a party who has little in the way of financial resources.

6.8.10 PENALTY FOR INAPPROPRIATE CLAIM

Parties may have made inappropriate or excessive claims.[166] Adjudicators were therefore asked if they penalised parties for making an inappropriate claim.

Table 6.16: Are parties penalised for presenting an inappropriate claim?

Views of adjudicators	**Number of adjudicators who agree (N = 17)**
Costs punitive	1
Costs compensatory	5
One factor considered	2
If it extended time unnecessarily	1
Vexatious/frivolous	3
Yes	3
No	2

Table 6.16 shows whether adjudicators thought that parties were penalised for lodging an inappropriate claim.[167] However, s 34 of the *Employment Contracts Act 1991* provided that nothing in any employment contract could prevent a finding that a personal grievance was a type other than that alleged.[168] Five adjudicators said that they thought that costs were compensatory and therefore not punitive. Some adjudicators said they thought costs were punitive if claims were vexatious or frivolous and the same number of adjudicators said they would penalise if inappropriate claims were made. The inappropriateness of the claim was only one factor to consider for two adjudicators, with the same number saying that they would

[166] Inappropriate claims could have meant vexatious or frivolous claims – see *Employment Contracts Act 1991*, s 99 – or could have meant claims brought under the wrong legislation or remedies which were not available under the *Employment Contracts Act 1991*.
[167] See above n for the definition of inappropriate.
[168] For a discussion of s 34, see para 6.4.13 and Chapter 2.3.3.

not penalise for inappropriate claims. One adjudicator commented that inappropriate claims extended the time involved unnecessarily, and another said that costs were punitive.

The largest number of adjudicators agreed that the purpose of a costs award was compensatory and should not be used in a punitive manner and consequently inappropriate claims were not all dealt with by using this approach. However this was not a unanimous approach; a variety of comments were made. One adjudicator said '[a]gain it depends on what the claim has been, in what circumstances the person has persisted with the claim, whether the person has been legally represented or got legal advice, or whether the person is a nutter.'

6.8.11 Frivolous or Trivial Claims

There was a possibility that adjudicators' time may have been wasted in hearing frivolous claims. To determine whether or not their time was wasted in hearings, adjudicators were asked whether they had had experience of having to adjudicate cases which were frivolous or trivial. Ten adjudicators said that they had not heard any frivolous claims with two of the 10 stating that all cases had some merit. Two adjudicators pointed out that frivolous or trivial claims were pre-empted at mediation. Two other adjudicators said that there can be elements to a case which might be irritating but people did not usually get involved in taking a personal grievance for the fun of using the process. One adjudicator said that although there were irritating points adjudicators could have used the legislative provision to strike out in frivolous or trivial cases.[169] Seven adjudicators said that they had had frivolous and trivial

[169] *Employment Contracts Act 1991*, s 99 provides, '[t]he tribunal may, in any adjudication proceedings, at any time dismiss any matter before it which it thinks frivolous or trivial; and in any

claims with six of those seven saying that there had only been one or two such cases. One adjudicator said:

> Yes. Well I've had cases where people have been in fights. They have behaved in ways that meant there is no relationship that could possibly continue between the employee and the employer and where I think they were ill advised by their lawyers. And you get that and it's quite clear but I think one of the chief factors is that when you go reading back on some of them it's usually a factual thing that determines whether it is frivolous or not. Because the chief thing that I find in these sorts of cases is if on the applicant's own facts it's a ridiculous case then you really do make a determination award heavily against them.

6.8.12 Decision on Whether a Case is Frivolous or Trivial

Adjudicators were asked how they determined whether a case was frivolous or trivial.[170]

Table 6.17: How do you determine if a case is frivolous or trivial?

Response of adjudicator	**Number of adjudicators (N= 15)**
Never Arisen	4
Would have to be blatantly ridiculous	2
Determination as to the nature of the case	9

Table 6.17 shows that nine adjudicators said that they would determine this question by the nature of the case and its surrounding circumstances. For four adjudicators that situation had never arisen, while two adjudicators said that the case would have to be blatantly ridiculous before they took action. These responses make it clear that the Employment Tribunal's time was not consumed with a whole series of ridiculous cases. Therefore adjudicators' time was not being wasted in needless hearings and

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such case the order of the Tribunal may be limited to any order on the party bringing the matter before the Tribunal for payment of costs and expenses.'

[170] Ibid, s 99, provided that the Employment Tribunal could strike out a case if it was frivolous or trivial. The Court in *Dickson's Service Centre Ltd v Noel* [1998] 3 ERNZ 534, applied a high standard: the test was very high. This decision was however in relation to s 121 of the *Employment Contracts Act 1991*, which related to the Court's authority to strike out in trivial and frivolous cases, rather than the Employment Tribunal. It has been assumed that the equivalent rule would have applied to the Employment Tribunal under s 99.

such cases could have been determined through either case management, where available, or mediation, where pursued. The lack of frivolous and trivial cases may also have been a result of the system itself. With a large number of applicants feeling the necessity to employ legal representatives to present their cases, it would not have been appropriate to waste funds on ridiculous cases.[171] One adjudicator said, '[t]he first thing I look at is if what they're claiming and even on their own facts it's ridiculous then it's obviously a frivolous case but quite often something is only frivolous if in fact the respondent's facts are preferred to the applicant's.' A second adjudicator said:

> In mediation it was just that there were people who had clearly come because Social Welfare had said to them we're going to stand you down for six months and they'd come here because they couldn't live you know. And they know that perfectly well. There are just the odd cases – I remember one once he'd made a major terrible breach of health and safety procedure he was a danger to himself and he'd done it twice. And there was no way he couldn't have been sacked because he was a danger to himself and others and any lawyer would have told him that. But Social Welfare had told him he'd be stood down so he was just going through the motions.

The small sample of adjudicators, only one third commenting on frivolous/trivial claims, made it difficult to draw firm conclusions and it may well be that the system weeded out such claims at an earlier stage; likely at the mediation stage.

6.8.13 EXCEPTIONAL CIRCUMSTANCES RULE

Where a party was in receipt of legal aid, the Exceptional Circumstances Rule meant costs would not be awarded against that party unless there were exceptional circumstances.[172] Adjudicators replied as follows:

- Fifteen adjudicators said that they had never applied the exceptional circumstances rule;
- Two adjudicators had applied the rule once.

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[171] For a discussion on representation see Chapter 5.4.4.
[172] See Chapter 5.4.7(a) for a discussion of exceptional circumstances which might apply when legal aid had been awarded by the Legal Services Board.

Of the 15 adjudicators who said that they had never applied the rule, for them to apply this principle they said:

- It had to be a really exceptional case.
- It's a high threshold that had to be met.

One adjudicator said:

> I was only faced with that situation and X had done it and it had gone to appeal and it was overturned and after that I've set my costs in accordance with I've never used those exceptional circumstances. So I don't think I could be persuaded. But X actually had a case and he awarded costs against a legally aided party and it was appealed and thrown out I think by Judge Finnegan and after that I just thought "no way".

6.8.14 HARSHNESS OF RULE

As the rule on exceptional circumstances may have appeared harsh, adjudicators were asked if the rule relating to exceptional circumstances in legal aid cases was too stringent. Seven adjudicators said yes. They provided the following comments:

- It's too harsh on a successfully defending party;
- There needs to be more ability to award costs when they should not have gone to mediation;
- Should look at the merits of the case;
- Should be able to award when cases were being dragged on by lawyers wanting legal aid money;
- Some milking of the system;
- It was too harsh.

Six adjudicators said that they thought the rule was not too harsh and stated:

- The legislation was fair and reasonable;
- The level was pretty high but probably appropriate;
- There had to be some protection for people who sought and were awarded legal aid and who proceeded with the case presuming there were no costs for them;
- Provided there was a safety barrier for applicants with genuine cases.

Four adjudicators said that they had never used the rule and had never thought about it.

6.8.15 Alternative to Exceptional Circumstances Rule

Adjudicators were asked if their answer to the above question was yes what an appropriate alternative rule would be. Adjudicators made the following suggestions:

- Legal aid provider should be able to revisit whether the person should have to contribute to costs;
- A question of whether it is just to shield a legally aided person;
- More flexibility to take circumstances into account;
- The mediator should be able to comment on the likelihood of success;
- Objective test as to whether the case has merit before legal aid is granted;
- Legal Aid Committee balancing people's right to be heard with which cases to grant;
- Legal Aid Committee should shoulder some responsibility for their decisions to grant legal aid to cases with little chance of success;
- Look at whether the threshold is too high;
- Legal aid should not be available in employment, or it should be limited;
- Costs against lawyers;
- There should be more in the legal aid pot.

One adjudicator indicated that they had never thought about this question. Another adjudicator said:

> I think it's not necessarily an alternative rule but maybe looking at the threshold as to whether it's too high and what the practical effects would be if it was perhaps changed. I quite like the notion of the exceptional circumstances because it does provide a safe guard. It does provide a barrier to test a case on but I would go so far as to say controversially I don't think legal aid should be available to anyone in the employment law jurisdiction and if it is it should be an amount of money to enable a person to get legal advice from an appropriate organisation to enable them to advocate for themselves their own cases. The employment law provides representation it is not an absolute right it's a choice and in an environment of civil matters and choice then one has to question the value that the tax payer gets for legal aid in the employment area where it might well be better placed in other jurisdictions.

As would be logically expected, exceptional circumstances rarely arose where it was appropriate to award costs against a legally aided party with one adjudicator

expressing total opposition to the actual concept and the finding of four saying they had not even thought about it.

6.9 RESOURCES

An issue raised by six adjudicators, approximately a third of the sample group, was what they perceived to be a lack of resources being provided to the Employment Tribunal. These adjudicators have compared the funding being made available to the Employment Relations Authority and have voiced some dissatisfaction at the level of staffing and services which were provided to the Employment Tribunal.

However, general comments made by adjudicators on adequacy of resources varied and included:

> We developed good mediation. The Tribunal had no fiscal cap and extensive statutory powers and it exercised the jurisdiction responsibly. The problems it had were not of its own making – there was a backlog from the [Labour Relations Act] and [Employment Contracts Act] and not enough Tribunal members for the case loads. It could have been more efficient with simple enforcement cases and it could have had better [public relations] and looked after its own interests better, but generally it was a good adventure.

> There is insufficient accountability from some individual members on their output etc. The voice of people going through the system didn't get heard. The delay in putting out decisions was the worst part. There were different practices between divergent registries there should have be one registry with serviced offices. The Tribunal didn't circuit to remote parts of New Zealand. There was a lot administrative inefficiency.

> The Tribunal did a good job under difficult circumstances of being insufficiently resourced. The problems with it could have been remedied rather than throwing the baby out with the bath water.

> It operated well; the only problem was backlog and resourcing. There is heaps more money in the new system.

> The Tribunal was hamstrung by resourcing issues and by the Court.

> I would say the Employment Tribunal if given the resources that the Mediation Service of the Labour Department and the Employment Relations Authority has…If you gave them that $40 odd million and you upped the number of people on the Employment Tribunal's mediation and adjudication function, then with perhaps a beefing up of the support staff to do more of the work that's done by low-level mediators, staff and their info centre, you could put that money into the Employment Tribunal as well, you'd have a system that worked just as well if not better than the Employment Relations Authority and the Mediation Service. But there was nothing wrong with the system as designed.

6.10 ADJUDICATORS' GENERAL COMMENTS

Finally, adjudicators were asked if they had any general comments to make about the adjudication process applicable under the *Employment Contracts Act 1991*. Adjudicators gave a large variety of responses, many of which have been outlined above. However, one specific answer to this question was:

> The Tribunal could have been a better mechanism and there are four areas of fault. 1. The Court made it excessively complex; 2. Tribunal adjudicators could have gotten together and got things going … There was bad productivity by adjudicators and some should not have been renewed but nothing was done; 3. The Department has been useless; 4. There was an absence of systems and guidelines, which also meant huge regional differences in productivity.

> It caused the Tribunal to get a lot of flak, be blamed for lengthy delays etc. It wasn't assisted by the fact that the Tribunal came to be dominated by people from the legal profession. Now the legal people said 'No, no, no. We're a Tribunal. We can't do this. We can't do that, we can't do the other. We've got to deal with this in a legal and appropriate fashion." People in the Tribunal who came through from the Mediation Service and wanted to take the less formal road, lost that argument in '91. There was a big debate that went on within the Tribunal itself and the lawyers won out. The [legal people] of this world won out…The Court was responsible and the group of excessive legalists within the Tribunal itself were responsible. And those of us who tried very hard to maintain the sort of inquisitorial style that we had, the way mediation would do business, we tried really hard and we just lost the battle. The Court just filled the hole with concrete. We were buggered, not to put too fine a point on it.

> [There] are Tribunal adjudicators who are just not cutting it, but they just get their warrants renewed. They've never been approached saying "Look. Here are the figures. Your productivity is rat shit. Do this, that or the other or you won't be renewed." That's never ever happened and should have done…You'll find massive regional differences between Wellington and Auckland. Auckland is a world unto itself. They don't talk with one another. There's so much we can do to get this damn system to work better. There's a manual that we all had. I wrote that in exasperation that there was nothing. It's absolute stupid arrogance. I think collectively they were full of pomposity so you actually got adjudicators of the Tribunal who…it's the biggest job they've ever had. It's gone to their heads and they can't think about delivery to the public because that's what it's about. It's about a service. Uneven application

> of a system fosters the feeling of injustice. Even application is a fundamental ingredient I think of delivery of justice. I took the practice note up to Auckland and they wouldn't have a bar of it.

6.11 CONCLUSION

The interviews have allowed an examination of the objectives of the *Employment Contracts Act 1991* from the perspective of adjudicators and whether those objectives were met. The value of adjudicators' views on these issues in the context of access to justice has been discussed more fully in Chapter Three. The information contained in this chapter has to some extent been presented in a quantitative format as the interviews were relatively structured. In addition to the use of the tables to summarise key points and provide context for the detailed comments made by adjudicators, this chapter used a qualitative approach to ascertain adjudicators' opinions. Some general conclusions on the categories examined were:

(a) Process

In general, although harbouring views on the efficacy of the process and the extent of its legalistic nature, none of the adjudicators interviewed believed that the process in itself entirely supported the ideals of a low level, informal Tribunal that provided speedy, fair and just outcomes. In essence, most agreed that its overall legal complexity and capture by the legal profession and the lack of adequate resourcing had caused delay and a lack of 'user friendliness'. Another negative feature identified by all interviewed was the delay occasioned by parties advancing unnecessary submissions and irrelevant witnesses being called due to the lack of rules governing this problem. Adjudicators had a variety of strategies to remedy errors in procedures

by parties. For instance in response to hostile parties, some increased formality, whereas others decreased it to keep the process moving.

(b) Types of Personal Grievances

Some adjudicators indicated a level of flexibility in dealing with different types of personal grievance. The main contentious issue and one of divergent opinion was how the process should be altered to cope with sensitive issues such as sexual harassment complaints. The degree to which sensitivity was practiced seemingly depended upon the attitude and/or gender of adjudicators. A lack of specialist awareness training, which many adjudicators sought, appeared to be a significant issue and a potential barrier to a fair and consistent approach to handling sensitive claims.

(c) Parties

All adjudicators to a certain degree accepted that an inherent power imbalance between employers and employees existed. In analysing this more deeply two main categories of imbalance were agreed upon, being economic power imbalance and concomitant access to skilled representation. The only exception generally at variance with this view was the relative lack of power of small poorly resourced employers.

Where inherent power imbalances were acknowledged by adjudicators they used various tools to redress these such as including discretionary intervention. Parties were able to adopt a variety of strategies to contain costs and reduce delay by the use of approaches such as class actions but no trends were discernable due to the small sample size.

Adjudicators demonstrated a good awareness of the need not to discriminate on the basis of occupational and social background differentials of applicants and gender, ethnicity and disability factors. Despite adjudicators requesting it, this however, did not appear to be supported by appropriate professional training on specific awareness of diversity issues. It could thus be concluded that adjudicators tried hard to accommodate the variables of parties' backgrounds and they devised strategies to ensure that the goal of overall fairness was not ignored. It was not clear to what extent adjudicators who said that they did not take characteristics of parties such as age, gender, occupation and ethnicity into account were fully conscious of potential prejudice and able to reflect on it and eliminate it from their deliberations.

(d) Representation

Adjudicators appeared fully aware of the need to make allowances for the varying skill levels of representatives and to, on occasion, assist inexperienced representatives. In particular, care was taken to assist self-represented parties. However, adjudicators showed little tolerance for incompetent experienced lawyers at the potential expense of fairness to parties who perhaps had legitimate claims.

To resolve imbalances some adjudicators suggested more emphasis on educating representatives and the setting of minimum advocacy standards.

(e) Costs

The cost of mounting a personal grievance was seen by over half of adjudicators interviewed as being a significant barrier to resolving personal grievances. This would seem not to be consistent with the objectives of the act of fair access to low level justice.

The approach to awarding successful parties recompense for costs incurred was significantly variable with no standard formulae being agreed upon. This was an area where adjudicators exercised wide discretion based on a number of contextual factors including Employment Court directives.

Legally aided parties generally had no cost implications except where exceptional circumstances were deemed evident. However, exceptional circumstances were rarely found and one adjudicator believed even this rule was too harsh.

Costs could arguably be a barrier to the pursuit of trivial/frivolous claims as only a third of adjudicators surveyed mentioned this as being an issue with most opining that the system weeded out such claims.

(f) General Opinion

A third of adjudicators interviewed considered that a lack of resources and uneven workload allocation were major issues in terms of the creation of delay and the ability to meet the objective that cases be dealt with expeditiously. Other factors identified by adjudicators that militated against the objects of the act included:

- Court imposed complexity
- Regional differences due to lack of consistent guidelines for adjudicators and resource allocation
- Workload allocation issues
- Domination by the legal profession and at time insistence on adherence to strict legal proceduralism at the expense of a less formal inquisitorial approach.

However, in general terms adjudicators were comfortable with the process and their ability to adapt it to emerging needs. In addition, the level of authority conferred by the formality of the institution and regulatory framework was seen to confer status on adjudicators and engendered respect by users.

Chapter seven examines the contrasting perspective of employees, employers and their representatives to determine their views on the efficacy of the system.

CHAPTER 7

INDEX OF TABLES

Chapter 7

SURVEY OF PARTICIPANTS IN THE PERSONAL GRIEVANCE ADJUDICATION PROCESS

7.1 INTRODUCTION

Chapter Seven examines a survey of all participants in 150 personal grievances decided in 1997. Participants were employees, employers and their representatives, together with parties who chose to represent themselves. A total of 407 personal grievances were adjudicated in 1997 by the Employment Tribunal. Due to financial and practical constraints it was impossible to survey the participants in 407 cases. It was therefore decided that a representative sample of 150 personal grievance cases was appropriate to survey in some detail. This involved surveying 150 employees, 150 employers and 300 representatives who each represented one of the parties. Despite these ambitious intentions, a small number of employees responded to this survey and this should be kept in mind when considering the results. A larger number of employers responded to the survey and many representatives chose to take part.[1] The nature of the questions asked affected the manner in which the data was analysed. It was decided that since parties were being requested to consider sometimes very personal information in the case of employees on matters which occurred some time ago, probably the most productive type of question would require only a short response rather than a detailed reflection. Sensitive information on the quantum of settlement and the type of personal grievance was not sought. Had the very small

[1] See n 28 and related discussion.

response rates been anticipated, an alternative approach that emphasised detailed qualitative analysis of a small number of cases would have been implemented.

The information sought from participants in personal grievances in this chapter was more about process than the analysis of cases in Chapter Five. The data contained in Chapter Five was obtained strictly from Employment Tribunal case decisions in 1997 and did not survey the personal views and opinions of participants in those cases. What the survey in this chapter did was to obtain the details of the views of participants in the personal grievance procedure that were not obtainable from the objective data in Chapter Five.

Although previous research on the outcomes of personal grievances had been conducted there was little information available on what impression the system had left on both parties and their representatives or whether it met their expectations.[2] One of the fundamental reasons for undertaking this research was to fill this knowledge gap. This chapter has identified trends and common views of participants who used adjudication as to the appropriateness of the procedure for their needs and whether or not there was a better alternative.

7.2 VALUE OF THE SURVEYS

It was important that users of the adjudication system could have their perceptions and opinions acknowledged and recorded. Parties and representatives were those who were most aware of how adjudication worked and if it met their requirements and, ultimately resolved the personal grievance. If users thought that an alternative

[2] See Chapter Four, n 9 and related text.

mechanism was more suitable then those alternatives were recorded. The questions also attempted to identify any barriers to resolution of personal grievances including costs and issues relating to representation.[3]

7.3 SURVEY CATEGORIES

To determine whether the process worked, questions for all survey participant groups were divided into sections:[4]

- *Representation* – that is, who represented whom;
- *Process* – which looked at people's perception of the adjudication process from commencement to resolution;
- *Mediation* – whether mediation had been used and if so why it had been unsuccessful; and
- *Adjudication* – the result of adjudication and whether parties were satisfied with the outcome.

7.3.1 SELECTION PROCESS

Of the 407 personal grievance cases decided in 1997, the percentage of cases heard in each region was divided up. These figures showed that 45 percent of cases were heard in Auckland, 23 percent in Christchurch, 20 percent in Wellington, nine percent in Hamilton and three percent in Dunedin. In relation to the sample of 150 cases this translated into 67 cases selected from Auckland, 34 from Christchurch; 30 from Wellington; 14 from Hamilton and five from Dunedin.[5]

[3] See Appendices I, II, III, IV for survey questions.
[4] Ibid.
[5] For a more detailed description of the methodology used, see Chapter 4.4.

7.4 EMPLOYEE AND EMPLOYER FINDINGS

Of the 150 employees surveyed only 28 or 18.7 percent replied. This was a disappointingly low response and it is only possible to surmise the reasons for the low rate of return. Of note, some parties were very difficult to locate and survey forms were returned as wrongly addressed, as discussed in Chapter Four.[6] Another possibility for the low employee response could have been that employees were not enthusiastic about discussing issues which had been resolved and had been dispensed with however, this possibility is entirely speculative. Out of 150 employers, 38 or 25.3 percent responded to the questionnaire. Again, this represents a low response rate, the reasons for which may have included businesses changing hands. However, like the low employee response rate, the reasons given are speculative although the phenomenon is perhaps not unusual. For example, a similar study that took place in the United Kingdom experienced the same difficulty with low response rates.[7] That study reported that out of a total of 53 potential participants only eight of those eventually took part.[8]

7.4.1 CHOICE OF EMPLOYEE REPRESENTATION

The first group of questions related to how employees selected their representatives and what factors affected their choice; in particular, whether the cost of representation was a significant factor worth consideration.

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[6] See Chapter 4.4.
[7] J Earnshaw et al, *Industrial Tribunals Workplace Disciplinary Procedures and Employment Practice* (Feb 1998) Department of Trade and Industry, UK.
[8] Ibid 10.

Table 7.1: Employees Represented by Unions[9]

Union Member?	Represented by Union?	Responses	Percentage
No	Not available[10]	21	75%
Yes	No	2	7%
Yes	Yes	5	18%
Total		28	100%

Of the total number of employees who responded to the survey, 21 were not union members and 7 were union members. Of the total number of union members who responded to this survey, 2 were not represented in their personal grievances by their union and 5 were. This question was asked to determine whether union membership amongst those who had been surveyed was representative of the overall working population at the time and whether those union members who participated in the survey had made use of their union in a representative role.[11]

Union representation reduced costs for employees due to either representation by the union staff or the union paying for legal representation.[12] Where these benefits had been lost (as in the case of those employees who had opted out of union membership) then the cost of taking a personal grievance significantly increased.[13] The low rate of union membership can be explained as arising from the National Government's policy on union membership and representation.[14] The supposition that the National party

[9] No self-represented employee responded to this survey.
[10] This meant that no union had coverage of the workplace concerned.
[11] General workforce membership of unions was 33 percent according to *Survey of labour market adjustment under the Employment Contracts Act*, (August 1997) Department of Labour.
[12] See Chapter 5.4.4.
[13] See Chapter 5.4.4 for a discussion on the cost of representation. See also 7.6.2 below for a discussion on representation and how fees were determined.
[14] [1991] 514 NZPD 1437; see also National, *New Choices*, 1–2: it was promised as part of the election campaign that, if elected, the National Party would, amongst other things, reintroduce voluntary unionism, encourage more flexible bargaining arrangements between employers and employees, allow employees to choose their own bargaining agents, and give workers greater flexibility to decide who would represent them in dispute procedures. Further, an assessment of the likely impact of the Employment Contracts Bill, if passed into law, made by the Public Service Association in 'Nats Plan

pre-election policy goals reduced union membership rates is supported by comparison between the level of union membership in the working population given by the Department of Labour at that time as 33 percent and the fact that only 25 percent of all applicants who participated in this survey were union members.[15] Further support for this proposition can be drawn from the fact that overall union membership in the workforce in 1985 stood at 683,006 members, whilst by 1995, after the passage of the *Employment Contracts Act 1991*, this figure had decreased to 362,200; a reduction to 53.03 percent of the 1985 figure and a loss of approximately 47 percent of the unions' membership base.[16]

Proportionately fewer union members took personal grievances under the provisions of the *Employment Contracts Act 1991* than prior to its passage. This was almost certainly because non-union members were for the first time able to take personal grievances.[17]

As noted above, from the survey of the Department of Labour, 33 percent of the workforce at large were union members. The survey for this research has shown that 25 percent of the applicants surveyed were union members but the low response rate makes it difficult to validate this lower figure. It may be because unions would have continued a vetting process (based on the strength of the case) that they had

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For A Future Without Unions', *PSA Journal*, Sept 13–Oct 10, 1990, was that unions would no longer play a special role, that workers would be encouraged to move to individual contracts, and that worker free choice would mean that Unions would no longer have a guaranteed membership..

[15] *Survey of labour market adjustment under the Employment Contracts Act*, (August 1997) Department of Labour.

[16] A Crawford, R Harbridge, and K Hince, 'Unions and Union Membership in New Zealand: Annual Review 1995' (1996) 21 NZJIR 188–193.

[17] However, see *Labour Relations Act 1987*, s 83, which provided for exemption from union membership on the grounds that the employee genuinely objected to being a member of a union. Those employees were issued with a certificate of exemption under s 95 of the *Labour Relations Act* and could have had direct access to the Labour Court under s 218(d).

previously operated under the *Labour Relations Act 1987*. This raises the question whether non-union applicants were more likely to bring personal grievances that had less merit than those that had been processed and advocated by the unions.

Table 7.2: How Employees (Applicants) Chose their Representative [18]

Method of finding representative	**Responses**	**Percentage**
Union	7	29%
Personal Contact	6	25%
Phone Book	4	17%
Usual Lawyer	3	13%
Recommendation	2	8%
Community Law Centre	1	4%
Citizens Advice Bureau	1	4%
Total	24	100%

Despite the small number of responses, Table 7.2 suggests that the most common way applicants who were not union members found a suitable representative was by personal contact. However, it may have been in some cases that the contacts obtained, whilst being legally qualified, were not necessarily employment law specialists and therefore may not have been the most appropriate representative in a personal grievance claim.[19] In such cases, inexperience of the representative resulted in some difficulty for parties. One explanation was employment law had become an expanding area of legal practice after the passage of the *Employment Contracts Act 1991* due to the opening up of this type of representation work to non-union practitioners and the newfound right of non-union members to bring a personal grievance. Evidence for this assertion is drawn from comments made by adjudicators interviewed for this

[18] Note small number of responses to this survey.
[19] See Table 7.6 and accompanying text for a discussion on the correlation between choice of representation and satisfaction of applicants in regards to both outcomes and the standard of representation that they received.

thesis that inexperience did result in some difficulty on occasion.[20] An example of one adjudicator's views on inexperienced and inappropriate representatives was:

> Some of them are very, very good. Some of them would drag a dead horse in here and try and get it reinstated…It doesn't mean to say that, like you're only human to say, what crap has he got today, you have to park that at the door when you go in and deal with it. You park that concern that this person only brings rubbish to the Tribunal. You park it and you check on the case. And you probably find it is another pile of poop, but you deal with the parties courteously… in the same way you would deal with someone who had a meritorious case.

According to this data, the second most common way for non-union members to select a representative was consulting the telephone book. This made it possible to locate a specialist employment law practice, as Barristers and Solicitors often list their specialties in the Yellow Pages. The third most popular way in which non-union members chose representation was to use their usual lawyer. This may have been satisfactory depending on the nature of their usual lawyer's practice, as previously discussed. The next most common method of selection for this group was to act on a recommendation. Again, it was possible that these recommendations could have been referral to representatives who lacked the requisite employment law skills and there was therefore some element of risk in using this approach. It may seem surprising that the least frequently used method of obtaining representation was through the Community Law Centres or a Citizens Advice Bureau. The reason for this being surprising is that Community Law Centres and Citizens Advice Bureaux have lists of employment law specialists, both counsel and advocates, to whom they may refer their clients. Furthermore, this referral service is free of charge.[21]

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[20] See Chapter 6.4.7 and 6.7.2 for a discussion as to adjudicators' views on poor representation standards.

[21] Personal experience from spending several years volunteering for Community Law Centres in Wellington and Christchurch where referrals (rather than direct advocacy) were made to appropriately qualified advocates and counsel and where referrals were received from Citizens Advice Bureaux. Also experience volunteering for the Citizens Advice Bureau in the Hutt Valley where referrals were made when required. It should be noted that the Legal Services Board in *Legal Services – a Community*

The potential cost of taking a personal grievance could have affected the choice of representative and indeed affected whether or not an employee decided to take a case at all. The cost of taking a personal grievance could therefore have been a barrier to accessing justice in the Employment Tribunal; a barrier recognised by adjudicators.[22] For those who qualified for legal aid the problem of the cost of representation was reduced, however access to legal aid was restricted.[23] The survey results have shown that the majority of these grievants chose to be represented by counsel. The costs involved could have been resolved either by representatives taking a flexible approach to the payment of their accounts, to the availability of legal aid or to costs not being apportioned until the personal grievance was settled.

Table 7.3: Did You Apply for Legal Aid?

Application for legal aid?	**Granted?**	**Responses**	**Percentage**
No	–	20	71%
Yes	No	1	4%
Yes	Yes	7	25%
Total		28	100%

Table 7.3 shows how many applicants sought and were granted legal aid. The table indicates that a large majority of those who responded did not apply for legal aid. The Barristers and Solicitors Rules of Professional Conduct require that clients be notified

Resource (1997) 51–52, stated that there were 18 community law centers nationally; however, there were nine districts that did not have Community Law Centres at that time. This meant that although there were a significant number of community law centres they were not present in all centres at that time. It is therefore perhaps for this reason that the result is not particularly surprising.

[22] See Chapter 6.8.2 for a discussion on adjudicators' views on costs associated with the personal grievance procedure being a barrier to accessing the adjudication process.

[23] See Chapter 5.4.8(a) for a discussion on the availability of legal aid.

about the availability of legal aid.[24] No similar provision applied to advocates who were not practising barristers and solicitors. Table 7.3 also shows that one applicant applied for and was not granted legal aid. Altogether 8 of applicants who responded received legal aid. These figures imply that the overall rate of requests for legal aid was low, however of those who did apply for it the success rate was high.

The high number of applicants who said they did not apply for legal aid could have decided not to because they had been advised they would not qualify because of the low-income threshold that applied.[25] A further possibility was that some representatives took a 'no win no fee' approach and therefore legal aid was not likely to be a consideration. To continue through the adjudication process without the guarantee of financial assistance arguably required a very strong belief in the strength of the claim. Reason dictates that recognition should also be made of an applicant group whose inability to procure legal aid coupled with an unwillingness to undertake personally the financial risks associated with adjudication, caused them to abandon any remedy for their personal grievances, either apparent or real.

Table 7.4: Did Cost Impact on Choice of Employee Representative?

Response	Response (N = 27)	Percentage
Yes	9	32%
No	18	68%

In the clear majority of the above cases, the cost of bringing a personal grievance (the combination of the costs of legal representation, lodging fees and disbursements, travel and time off work, which were not included as specific sub groups in the survey

[24] See *New Zealand Law Society, Rules of Professional Conduct For Barristers and Solicitors*, 7th ed. Rule 1.02 (5) indicates members of the legal profession must alert clients to the availability of legal aid. It is expressed as a 'duty'. Interestingly, firms have no obligation to take on legal aid clients!
[25] See Chapter 5.4.8(a) for a discussion on the availability of legal aid. See also Chapter 8.2.3(a).

questionnaire) did not affect the choice of representative for applicants. This may have been because parties looked at issues other than this cost when selecting representatives; such as a strong belief in the strength of their case and that costs would therefore be awarded against the other party. Another reason for costs not affecting this result may have been that, as shown in Table 7.3, 25 percent of applicants were in receipt of legal aid.[26] A condition of the provision of legal aid was that the representative was required to be a practising Barrister and Solicitor who had been approved by the District Law Society, which meant that the applicant's choice of representative was constrained.[27] Costs also would not necessarily have been a factor if an applicant was a member of a union and therefore able to take advantage of union services; it should be noted that although in general such costs were often met by unions there was no blanket access policy that operated to meet all costs in all circumstances.

7.4.2 CHOICE OF EMPLOYERS' REPRESENTATION

Table 7.5: Who Represented Employers at the Hearing?

Representation	**Response**
Counsel	27
Advocates	5
In-house-representative	2
Self-Representative	4
Total	38

[26] Ibid.
[27] *Legal Services Act 1991*, s 158F(1)–(5) specified that the District Law Society would provide a list of suitable Barristers and Solicitors who were fit, proper, and willing to undertake legal aid work to the District Legal Services Committee.

Of 150 employers surveyed, only 38 replied to this questionnaire (25 percent). It is unclear why the response rate was so low.[28] It is possible that employers did not wish to revisit a resolved issue, they did not choose to participate in a survey of this type,[29] they simply did not consider the process of much value or the time required to participate may have appeared cumbersome. Research conducted by Jill Earnshaw in 1995 indicated that the reason for employers' refusal to participate may have been their unwillingness to have their shortcomings before the Tribunal exposed to researchers.[30] This could mean that those who did choose to participate reflected a bias in favour of the system in they used. Alternatively, it could be argued that those employers who chose to participate did so to criticise a system that they believed to have been unjust.

Table 7.5 shows that by far the majority of employers chose to be represented by lawyers, followed by advocates, in-house representatives and lastly those who chose to represent themselves.[31] However, three of the four self-representatives did not complete the survey forms for self-representatives and thus had to be discarded from that category. The person who chose self-representation said that the reason they chose this option was that 'the lawyer was incompetent'. The lawyer had represented this employer at a pre-hearing stage and subsequently the employer chose to represent him or herself at the hearing.

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[28] This result may not be unusual for this type of survey. See *Industrial Tribunals, Workplace Disciplinary Procedures and Employment Practise*, 1997, Department of Trade and Industry. See also J Earnshaw, J Goodman, R Harrison, M Marchington, above n 7, where a letter and telephone based methodology elicited a response rate from employers of only eight percent. In contrast see L Dickens, *Dismissed: A Study of unfair dismissal and the tribunal system* (1985) where a high percentage of responses from employers was achieved through the use of a three stage process of, forwarding a letter, making telephone or personal contact, and then conducting an interview in person.

[29] Response to survey questionnaire where employer refused to participate as they did not like taking part in this type of research.

[30] J Earnshaw et al, *Industrial Tribunals Workplace Disciplinary Procedures and Employment Practice* (Feb 1998) Department of Trade and Industry, UK.

[31] For a discussion on self-representation, see 7.6.6 below.

7.4.3 STANDARD OF REPRESENTATION

Table 7.6: Were Parties Satisfied with the Standard of Representation?

	Yes	No	Total	Number
Applicant	71%	29%	100%	28
Respondent	81%	19%	100%	37

Table 7.6 shows whether or not applicants and respondents were satisfied with the standard of representation they received. There were two categories of applicant: those who were union and non union members. Those who were union members could have been represented by a union representative or by counsel or an advocate provided by the union. Alternatively, such applicants could have chosen to appoint their own counsel or advocate as non-union applicants were obliged to do. Applicants were asked whether they were satisfied with the type of representation that they chose. One of the reasons for this was because at an earlier stage in the survey, applicants had been asked whether or not they were union members and if so whether the union had represented them. They were then asked in some detail as to how they chose their representative. Overall, 20 applicants were satisfied with the type of representation they chose and 8 of this group expressed dissatisfaction. By comparing the results of Table 7.6 with the responses to the survey question 11, 'In your opinion did the adjudication process finally resolve the personal grievance?', it was possible to establish that there was little, if any, correlation between an applicant's satisfaction with their representative and the party's view on resolution of the personal grievance. In only half of cases where applicants did not believe the personal grievance had been resolved, the applicants expressed dissatisfaction with their standard of representation. Applicants gave various reasons ranging from, 'The witness lied' to 'I was ripped off

by a dishonest employer' as to why, in their opinion, the personal grievance had not been resolved.

In respect of those who reported a feeling that the personal grievance had not been resolved the social climate of the time may have led to low expectations on the part of applicants. For example, one union official of the time was reported in an academic work as (while commenting on the impact of the *Employment Contracts Act 1991* coupled with the initiatives to deal with unemployment) having stated:[32]

> Carpenters used to be on an average rate of about $12.00 an hour with travelling time and with guarantees of pay when the building was stopped because of bad weather. All of that is gone. Carpenters are now being employed in the Lower Hutt on a rate of eight bucks [sic] an hour. So they lost $4.00 an hour. No travelling time and no down time. There is no over time. Job and finish. Flat rate.
>
> Well, it's very difficult on those carpenters but they have families to feed and the unemployment benefit is below $8.00 an hour. And if they turn the job down, they face 26 weeks stand down. So they are being press-ganged into accepting terrible rates.

Higher expectations on the part of employer respondents (given that the legislation in force at the time was seen in certain quarters as to some extent reflecting the agenda of the New Zealand Business Round Table) may well account for some of the dissatisfaction they expressed.[33]

Table 7.7: Were Employers Satisfied with the Type of Representation They Chose?

[32] Ellen J Dannin, *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act* (1997), 108, citing Rick Barker, National Secretary New Zealand Service Workers Union.

[33] Ibid. Dannin cites Treasury's: *Briefing Paper to the Incoming Government 1990*: 'Treasury identified three fundamental flaws in existing labour law, flaws which also resembled those identified by the New Zealand Employers Federation and New Zealand Business Roundtable – (1) it placed collective bargaining in the hands of unions and employer associations even though individual companies and workers "have better information and incentives to reach agreement"– (2) Unions were not accountable to employers or workers – (3) the law made it virtually impossible to alter bargaining arrangements.'

	Satisfaction =Yes	Numbers
Advocate	100%	5
In-house representative[34]	100%	2
Counsel	81%	26
Self-representative[35]	50%	4

Table 7.7 indicates that the majority of those employers surveyed were happy with their choice of representation. It is not clear why some types of representation were considered more satisfactory than others and variations in satisfaction may be influenced by the small sample size. However, it would be fair to bear in mind some of the observations already made in the earlier parts of this chapter.

7.4.4 MEDIATION

Table 7.8: Did Parties Attend Mediation?

	Yes	No	Total	Number
Applicants	75%	25%	100%	28
Respondents	76%	24%	100%	38

To determine whether adjudication was the first formal attempt to resolve the personal grievance parties were asked whether they attended mediation.[36] It should be noted that mediation was not a compulsory step in resolving personal grievances under the *Employment Contracts Act 1991*.[37]

Table 7.9: Did the Representative have Experience in Mediation?[38]

	Yes	Number	No	Number
Counsel	74%	80	1%	1

[34] In this thesis, in-house representative means an employee of the respondent who specialised in employment law/human resources.
[35] This percentage should be treated with caution because of the very limited response from self-represented parties.
[36] See Chapters 2.4.2 and 6.4.11.
[37] Ibid.
[38] The results are presented as percentages of the total number of representatives surveyed.

Advocate	14%	15	2%	2
Union Counsel	4%	4	–	
Union Advocate	5%	5	–	

Total for whole table = 100%

All representatives in adjudication were asked whether they had any experience of mediation. Table 7.9 shows that the vast majority of representatives had such experience. This is unsurprising given the relatively high number of mediations (compared with adjudication) that occurred under the *Employment Contracts Act 1991*.[39] It was significant that although mediation was not compulsory under the *Employment Contracts Act 1991*, 70 percent of those cases which were mediated were successfully resolved.[40] The high experience rate shown could have reflected a strong commitment by both counsel and advocates to resolve personal grievances at mediation. On the other hand, counsel and advocates could have used mediation as a 'fishing-expedition' to learn details of the opponent's case prior to adjudication. In support of this view, one representative said, 'It was an abuse of process, used as a fishing expedition'. Further, a sample of representatives whose personal grievance cases had proceeded to adjudication gave the following reasons for why mediation had been unsuccessful:

> Usually because applicants are unrealistic in the level of compensation they seek or because on principle the company will not settle, for example a theft situation;
>
> Employer not prepared to move at all;
>
> Employer on power kick;
>
> The mediator followed stock standard routine process. Never got beyond position-taking, and the mediator insisted on giving his view as to the legal merits of the respective causes.

[39] See Chapter 6.4.11. See also Chapter 2.4.2: mediation was successful in over 70 percent of cases.
[40] See *Employment Contracts Act 1991* and Chapter 2.4.2.

Table 7.10: Was Mediation Attended (Prior to Adjudication) and Who Represented the Parties?

	Yes	No	Total	Number
Counsel	70%	30%	100%	81
Advocate	76%	24%	100%	17
Union Counsel	50%	50%	100%	4
Union Advocate	60%	40%	100%	5

Table 7.10 shows whether mediation was attended or not and the type of representative concerned. The percentage rate refers to the percentage of all representatives surveyed. For example it can be seen that most of the representatives surveyed who were advocates attend mediation. What is not clear from the answers to the question was whether mediation was attended for the specific case included in the database in Chapter Five.

Table 7.10 raises the question as to why the overall figure for union involvement was low, given that the Department of Labour reported that union membership amounted to 33 percent of the working population in 1997.[41] However, the table figures represent only those personal grievances that went to adjudication and therefore do not take into account those which were successfully resolved at mediation. The figure for successful resolution in such cases was 70 percent, as discussed above.[42] Therefore, it may be possible to draw the inference that unions tended to use the mediation process as an effective mechanism for the resolution of personal grievances wherever possible, in preference to invoking the adjudication process. If this inference has been correctly drawn then applicants who used the services of their union would have the advantages of being a party to a mutually agreed settlement, a shorter time

[41] Department of Labour Industrial Relations Service: *Survey of labour market adjustment under the Employment Contracts Act*, August 1997.
[42] See Chapter 2.4.2.

between the personal grievance arising and its resolution, and corresponding reduction in costs. There is no doubt that the unions developed a substantial level of skill in negotiating settlements via the conciliation conference process which operated under the provisions of the *Labour Relations Act 1987*.[43] These advantages, of course, must always be weighed against the possibility that unions may have been inclined to negotiate settlements at mediation which were not as beneficial to the applicant as may have been awarded had the personal grievance been heard at adjudication. This matter will be discussed with a view to the access to justice issue in Chapter Eight along with the conclusions to be drawn from the data on Counsel and Advocates.

Of further note, counsel had the ability to represent both applicants and respondents, giving them access to a greater pool of clients, compared to the unions who only represented member employee applicants. Given that unions could only service applicants who were members of the union, it is arguable that they could only represent 33 percent of half of the overall client pool. However, it is noteworthy that union membership was at the time skewed towards those working in the state sector which would shorten the unions' reach in respect of representing those working in the private sector. Some unions did set up 'for profit' units to try to reach into the private sphere.

It is at least arguable using the work in this thesis that the reason for a greater preponderance of counsel over advocates at the adjudication level was due to the formal and legal requirements of the adjudication process itself. Further, the surveys

[43] *Labour Relations Act 1987*, Part 9.

completed by legal representatives gave anecdotal evidence suggesting that factors such as the ability to obtain legal aid for adjudication; the public perception that the use of qualified counsel was of greater advantage in the legal process; and the belief that, to some extent dependant upon their experience, advocates were more likely to avoid the formal adjudication process in favour of utilising their skills as negotiators at mediation.[44] It is further suggested that for those advocates who were working on a contingency fee basis there existed an incentive to settle the matter at mediation as a matter of economics.

7.5 THE ADJUDICATION PROCESS

Table 7.11: Were Parties Aware of Their Legal Obligations?

	Yes	No	No Response	Total	Number
Applicants	68%	25%	7%	100%	28
Respondents	58%	26%	16%	100%	38

The nature of the personal grievance procedure, including the lodging of forms and the 90-day rule, made much of the personal grievance process fairly technical and legalistic.[45] Parties were therefore asked whether they were aware of their legal obligations, to find out how well they understood the process in which they had become involved. Altogether, 68 percent of applicants and 58 percent of respondents said that they were aware of their obligations.[46]

[44] Telephone conversations with Dennis Standring and David Beck, Barristers and Solicitors, SB Law (employment law specialists), Christchurch, 17 January 2006.
[45] See Chapter 5.4.4 and Chapter 2.4.1.
[46] See Chapter 6.4.2 for a discussion on administrative process and legal obligations.

Awareness of the legal obligations was perhaps most critical for the group who represented themselves. The one usable response in the self-representative category reported as having had previous experience and that they found the process to be legalistic. Notwithstanding these comments about legalism, the respondent in question believed that the personal grievance had been resolved. Those who were represented by either counsel or advocates would in general, have been able to rely on the advice and assistance of their representative to ensure that their legal obligations had been met.

Further analysis of the survey responses of this group in Table 7.12 shows that a large majority of them saw the process in a negative light as they reported it as either confusing, time consuming, legalistic, intimidating or any combination of these. Far fewer reported that although the process had been time consuming it was also, in their opinion, satisfactory. One view expressed by a dissatisfied party was, 'I don't believe the lawyer considered my case serious or of importance, bad preparation and took too long to go to Court [sic]'. Although it would be unfair to hold this comment up as representative of the entire group under consideration, there were other comments in a similar vein.

Participants in the survey could express their opinion by ticking as many boxes as they considered relevant to their experience. By choosing the option 'satisfactory', the participants qualified a negative response so that 'formal', which seems contrary to government intent, when combined with 'satisfactory' on the same questionnaire, suggests that from the participant's personal perspective that the process was satisfactory despite its formality.

Table 7.12: How did Parties Describe the Adjudication Process?

Response	Applicants	Respondents
Confusing	21%	8%
Formal	43%	18%
Informal	7%	16%
Legalistic	36%	18%
Intimidating	46%	18%
Time-consuming	50%	53%
Satisfactory	21%	37%
Number	28	38

These categories, with the exception of the question whether the process was satisfactory, were designed to evaluate the National Government's stated intention that the personal grievance process should be quick, informal, and straightforward.[47] In addition, an opportunity was provided within the question for participants to record any 'other' comments they may have wished to make on their experience of the personal grievance process. The responses to this part of the question were so disparate that they could not be recorded in table form.

The survey also aimed to address the issue of formality as raised in academic commentary. One such commentator noted that:[48]

> [T]he relative formality of the Tribunal process, with its attendant regulations presents a stark contrast to the relatively informal "shuttle diplomacy" of the Grievance Committee framework in the Labour Relations Act 1987.

It is of further note that the necessity to avoid legalism was one of the four criteria raised by the Department of Labour in argument for the provision of specialist

[47] [1991] 524 NZPD 1437. See also Chapter 2.5 for further discussion.
[48] J Hughes, in R Harbridge (ed), *Employment Contracts: New Zealand Experiences* (1993) 96.

institutions to address employment matters.[49] In another contemporary document, the Department of Labour took the view that if specialist institutions were not available then legal and transaction costs would 'create an advantage for the well endowed over the poorly endowed'.[50]

The descriptors in Table 7.12, however, should not necessarily be taken one-dimensionally. If survey participants found the process legalistic, formal, time consuming, confusing, and intimidating, the process would be viewed negatively both in relation to the intentions of the National government and the personal experience of the participants. The word 'informal' is taken to have positive connotations in both respects. The analysis emphasises the relationship between the descriptor 'satisfactory' and the other choices.

As the central theme of this thesis is access to justice, if any of the negative descriptors was accompanied by the 'satisfactory' qualifier, then it may be argued that to some extent, remembering all those surveyed had their personal grievance adjudicated, the general principle of access to justice has been achieved. The 'other' comments category also acted as a qualifier, as well as a catchall question.

To an extent, these findings are limited by the design of the questionnaire, which did not expressly ask participants to provide reasons for their views. At the time the survey questionnaire was designed, it had not been intended to go to such depth. Given the multitude of meanings that individuals could attach to the list of

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[49] Department of Labour, 'Employment Contracts Bill: Outstanding Policy Decisions' to Minister of Labour, 29 January 1991.
[50] Inter-Departmental Officials Committee, 'Employment Contracts Bill: Outstanding Policy Issues', 22 March 1991, as cited by R Ryan and P Walsh 'Common Law v Labour Law' (1993) *Australian Journal of Labour Law* 230, 246–247.

descriptors, a more informative response might have been obtained had the reasons underpinning the answer provided been sought directly.

7.5.1 'CONFUSING'

Altogether, 21 percent of applicants thought that their adjudication process was confusing. One applicant, in describing this perception, commented, 'What I thought that the truth would be bought [sic] out more clearly. However it's like any other court, how clever are the people you have representing yourself or department.' One applicant, whose adjudication took place in Auckland, reported being dissatisfied with the standard of service provided by their advocate and recorded as reasons for their dissatisfaction the following comments: 'He [the advocate] thought we could not lose – did not ask me to get witness to come in [sic]', 'very expensive for what I got', and in answer to the question as to why mediation was not attended: 'Was never given a option – he [the advocate] wrote to my employer'.

In line with results taken from the general population of the surveyed participants, the six members of this group who found the process 'confusing', although reporting as a whole satisfaction with their representative, also reported to a high degree (83 percent) that the personal grievance had not been resolved. One of the most explicit reasons given by an applicant for reporting a lack of resolution in their case was:

> The Court found for me in adjudicator Court [sic]. [The respondent] refused to pay. He [the respondent] then took it to the Appeal Court. They once again found for me and he refused to pay. It then went to the District Court and he didn't even turn up. My lawyer is now trying to get it accepted in the High court.

This statement has provided evidence that the Applicant concerned was not happy with the resolution of their personal grievance, as it was still going through the hearing process in different venues. The normal process for conducting personal

grievances was by mediation if both parties agreed,[51] adjudication by the Employment Tribunal,[52] appeal on a point of law to the Employment Court[53] and the final stage in the process being removal to the Court of Appeal.[54] A further breakdown of the responses received from this group revealed that in every case where an applicant reported as being confused by the process it was also reported that the applicant had found the adjudication to be intimidating.

Applicants chose more descriptors than respondents, some describing the process to be confusing, formal, legalistic, and intimidating. Some substituted 'formal' with 'time consuming'. On the issue of legalism one applicant described the experience as '…a Hollywood drama on lawyers dodging issues and saving costs for [the respondent]'. Interestingly, one member of this sub-group reported the personal grievance as being resolved despite elsewhere expressing dissatisfaction with the evidence adduced, the adjudicator's tendency in the applicant's view to believe the 'lies' told by and on behalf of the respondent, and a belief that adequate compensation had not been awarded. Of the total group of 'confused' applicants none chose to qualify their response by using the 'satisfactory' descriptor or commenting under 'other'. At the same time, some parties had to assess the shifting nature of their relationship with a previous employer. A relevant comment is drawn from one applicant's response, 'I was facing an enemy; you can forget your work service years. They arrogantly see you as less than a person'.

[51] *Employment Contracts Act 1991*, s 79(a).
[52] Ibid, s 79(c).
[53] Ibid, s 94.
[54] Ibid, s 95.

From this analysis it is clear that for these applicants the adjudication process was not a positive experience and therefore, when measured against the objectives of the legislation, as promulgated by the then Minister of Labour,[55] for this particular group of participants the process had fallen short.

Table 7.12 shows that, in contrast to the applicant group, only 8 percent of respondents reported the adjudication process as confusing. Although fewer used several descriptors, none who used confusing used satisfaction or qualified their answer with a personal comment. As with applicants reporting confusion, it is clear that the adjudication process fell short of the respondents' needs and of the then government's objectives.

It is suggested that once the process had progressed beyond the mediation stage the likelihood of a win/win solution became more remote, as the opportunity to explore mutually acceptable solutions had ended. Further, the parties could have been likely to feel that they had lost personal control of the matter, as the process would then have been in the hands of their representative and the outcome decided by the adjudicator. Not only were the financial aspects of the case at risk for the parties but also personal qualities such as their self-esteem, dignity and integrity.

As previously discussed, respondents reported as being confused at a much lower level than applicants. One possible explanation for this difference was that the

[55] [1991] 524 NZ Parliamentary Debates 1437. See also Chapter 2.5 for further discussion.

adjudication process, by its nature, required considerable 'paper shuffling'[56] and knowledge of legal concepts and processes.

7.5.2 'FORMAL'

Table 7.12 shows that 43 percent of applicants believed that the adjudication process was formal. Further analysis shows that only one of these people believed that the process was also satisfactory. Table 7.12 shows that 18 percent of respondents believed that the adjudication process was formal. Of these people, three considered the process was also satisfactory. As discussed above when considering skill sets, and for the same reasons, it was likely that applicants found the procedure more formal than respondents when faced with the courtroom arena and the procedure and etiquette involved in presenting and examining evidence and felt less well equipped to cope with the process.

Table 7.12 clearly shows that few respondents thought that the procedure was formal. For a small minority, the survey showed the legislators' intention to make the process informal had not been met.[57] However, in the majority of cases respondents' answers could be construed as meeting the legislature's intent. Conversely, for the applicants it was said in one questionnaire that the '[w]hole process was new to me.' Another response was, 'QC for employer at mediation' and thirdly, 'legal points ruled and grass roots facts never got heard or presented.'

The difference in the views of respondents and applicants on formality has raised the question whether the structures and support formerly enjoyed by applicants under the

[56] See Chapter 6.4.1 for related discussion. Also see Appendices 1 and 2 on question 1.4.
[57] See Chapter 2.4.6.

Labour Relations Act 1987 had been destroyed by the introduction of the *Employment Contracts Act 1991*. Changes to union organisation, as contemplated in the Employment Contracts Bill,[58] also by inference, undermined traditional structures to which applicants would have had recourse. This was exemplified by the 'shuttle diplomacy'[59] that took place under the *Labour Relations Act 1987* in the Grievance Committee process when compared with the more formal system initiated by the *Employment Contracts Act 1991*. Respondents arguably maintained a higher level of access to the requisite skill set, as observed above, because their position in the employment market remained unchanged, or even strengthened, by the weakening of unions.

Alienation from the process is likely to have been exacerbated for those applicants who were claiming unjustified dismissal where, at best, the applicant was a former employee and had obtained work elsewhere. In other cases the applicant was unemployed. In either case the applicant was removed from their daily association with former workmates and normal support structures, which may have deprived the applicant of ready access to workplace counsel, information, and support.

In the case where the applicant had become and remained unemployed (remembering that economic statistics indicate a high rate of unemployment at the time) the applicant's position would have been further exacerbated by having to cope with situations such as those described in one access to justice issue survey:[60]

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[58] [1991] 524 NZ Parliamentary Debates 1437.
[59] J Hughes, in R Harbridge (ed), *Employment Contracts, New Zealand Experiences* (1993) 96.
[60] Advisory Committee on Legal Services, 'Te Whainga I Te Tika: In Search Of Justice', report to the Government (1986).

> For the unemployed, economic survival carries with it a range of problems, many of which involve the law. Inability to pay for basic services such as housing, power and transport often turns into legal battles over tenancies, bonds and letting fees, debts, hire purchase repossessions and refinancing. People know little about the powers of debt collectors, landowners, bailiffs and police. Stresses of unemployment also spill over into domestic disputes, separation, custody and protection proceedings.

If this finding is accepted then there is reason to believe that for unemployed applicants the same 'stresses of unemployment' spilled over into the adjudication arena of employment law.

This type of unemployment related stress was influenced by the provisions of the *Social Security Act 1964* which was then in force. Under s 60H(3) a 26 week stand-down could have been imposed if the Director General was satisfied that an applicant for a benefit had lost their employment due to misconduct.[61] With the prospect of six months without income, applicants had little to lose by bringing a personal grievance claim which then entitled them to short term income support under the *Social Security Act 1964* even in cases where they had been justifiably dismissed. It has been claimed that this was one cause of the backlog in personal grievance decisions in the Employment Tribunal.[62]

It is suggested that for union members the possibility of avoiding this stress, particularly where the member was not at fault, can be seen from the union process as identified by one official:[63]

> One of the benefits which union membership in New Zealand brings is free access to legal representation and advocacy for employment matters. Payment of the union subscription means a union member will pay nothing for this service. Like Insurance, it is a benefit which you hope never to use, but is available when the need arises… the way in which a union manages a grievance – or any legal action – generally differs from the approach taken in

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[61] J Hughes, *Employment Law Bulletin* (1994) 3.
[62] Ibid, citing 'Report of the Labour Committee on the Enquiry into the Effects of the EC Act on the New Zealand Labour Market, New Zealand House of Representatives,' I.9D, 1993, 40–41.
[63] W R C Gardiner, 'The Employment Tribunal, (A Report From the Trenches) 1998, citing A Little, New Zealand Engineering Union, as published in *Employment Today*, March 1995.

> private practice and goes beyond merely cost saving to the aggrieved worker. A union will generally try to avoid the need for a third party. Before a personal grievance is put in the hands of a lawyer, the union will have tried vigorously to sort it out on the job.

In comparison, the respondent group as a whole, although operating under the stress of a new legal challenge, operated in an environment where their organisational and personal workplace support structures remained mostly intact.

7.5.3 'INFORMAL'

Only 7 percent of applicants and 16 percent of respondents described the adjudication process as informal. Parliament's intention that the Employment Tribunal and its procedures would resolve personal grievances informally had therefore not been met in the view of participants.

7.5.4 'LEGALISTIC'

When asked if the adjudication process was legalistic in nature, 36 percent of applicants said 'yes' and 18 percent of respondents agreed with this view. However, legalism could be seen either as a positive or a negative factor. Any legal process probably requires some degree of legalism[64] to establish its credibility and practical workability. Conversely, too much legalism could have made the process cumbersome and difficult for parties to manage and be involved in.

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[64] In B Garner, *A Dictionary of Modern Legal Usage* (2nd ed, 1995), legalistic was defined as 'a rather contemptuous term meaning "formalistic; exalting the importance of formulated rules in any department of action."' In R Ryan, and P Walsh, 'Common Law v Labour Law: The New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 246, it was argued that informal meant, amongst other things, less reliance on formal procedures and a more investigative approach with less reliance on lawyers and a reduction in the cost of representation. Whilst not defining legalism per se this discussion focussed on the meaning of informal; this to some extent is almost the opposite of legalism.

7.5.5 'INTIMIDATING'

Some 46 percent of applicants and 18 percent of respondents described the process as intimidating. None of these people thought the process was satisfactory. Parties were not asked why or how they held this view. It is therefore not possible to determine their reasons. It may simply have been that participating in a formal legal process created some level of intimidation. Alternatively, it may have been the nature of the personal grievance itself and the behaviour of the parties to it which caused intimidation. This possibility has been alluded to above when discussing applicants dealing with the consequences of unjustifiable dismissal.

7.5.6 'TIME-CONSUMING'

Parties were asked whether or not the personal grievance adjudication procedure was time-consuming. Applicants and respondents were very close to agreement on this question, with 50 percent of applicants and 53 percent of respondents stating that the adjudication process was time consuming. What is not clear from this finding is whether both applicants and respondents were referring to the hearing itself or whether they were referring to the whole personal grievance process from lodging the grievance until the date of decision. In hindsight, the question could perhaps have been more tightly framed. However, as discussed earlier, any unnecessary consumption of time is, in the view of this survey and in light of the then government's expressed intent, a negative outcome both at any part of or throughout the whole of the process. As indicated earlier there was still scope for participants to qualify their opinion in regard to this particular issue by the addition of the term 'satisfactory' into their response. In fact none of the applicants took up this option. Of the respondents who reported the process as time consuming, 17 percent (6 people)

also reported satisfaction, suggesting that for this group the time taken to reach the decision did not in their view render the process unsatisfactory. One respondent reported that the process was 'time consuming, [but] understandably so though' and also reported the process as satisfactory by stating that '[it was] positive; we felt well understood and heard. The adjudicator was excellent, highly professional!'

7.5.7 'SATISFACTORY'

Applicants and respondents were asked whether they thought the adjudication process was satisfactory. Only 21 percent of applicants and 37 percent of respondents thought the procedure was satisfactory. However, this result must be read in the context of discussion regarding the participants' concept of the word resolution (See Table 7.16). The inference was that the parties appeared to report satisfaction on the basis of the outcome they received, that is whether or not the Employment Tribunal found in their favour, rather than giving an opinion on the adjudication procedure itself.

7.5.8 DID ADJUDICATION WORK?

Table 7.13: How did Parties Describe the Adjudication System?

	Employee		**Number**	**Employer**		**Number**
	Yes	No		Yes	No	
Quick	27%	73%	24	30%	70%	33
Inexpensive	29%	71%	28	18%	82%	34
Straightforward	50%	50%	28	62%	38%	34

Parties were asked how they would describe the actual adjudication system. The questions, as framed, related to the intention as expressed by the legislature when introducing the Employment Contracts Bill into Parliament.[65] Table 7.13 shows that employees and employers had very similar views on the speed of the process. More

[65] [1991] 524 NZ Parliamentary Debates 1437.

than half of the parties thought that the adjudication system did not meet the legislators' intention that the system be quick, easy and inexpensive.[66] One applicant commented that, 'it was quick for the actual hearing but too slow to get a date set, over a year' and in respect of procedure they stated the view that, 'Mediation would be a more effective procedure than adjudication, if parties were committed to taking ownership [sic] in resolving matter'.

The response to the question whether adjudication was inexpensive was very similar. The majority of both employers and employers were of the opinion that adjudication was expensive. This therefore failed to measure up to the legislative intent.[67] Some comments on this matter by respondents were:[68]

> Legal and witness fees were approximately $12,500 and we were awarded only $1,500 in costs, despite winning the case.
>
> Costs approximately $10,000 to $15,000 [the other party] gave his resignation in front of several witnesses and still went to the adjudication with legal aid. I understand he was granted $3,500 on his first attempt. After many letters to his solicitors was turned down. Third attempt [the other party] was granted more legal aid approximately $4,000 plus and carried on to the Tribunal. I think he should not have been granted so much legal aid as his case was absolutely hopeless. He was also convicted afterwards of four charges of perjury, on allegations that he made to the police against me.

The following comments were made by employees:

> This same case has been to Appeal Court, District Court and now High Court and still waiting for payment.
>
> The cost of lawyers was over $8000.[69]

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[66] See Chapter 6.4, Category 1: process; 6.4.1: nature of the adjudication process; see also Chapter 2.3.1: political development.
[67] Ibid. See also below for a discussion on how representatives determined their fees.
[68] See Chapter 8.2.3 for discussion of outcomes and costs.
[69] This applicant had been refused representation by their union and instructed their own lawyer. There were two Employment Court hearings and then a High Court hearing. The only tangible result obtained by the applicant was an offer of a reference from one of the respondent's managers, which the applicant refused.

Of those employees who reported that the process was inexpensive, 64 percent obtained representation through the services of their union or were granted legal aid.[70] The remainder, with only one exception, used advocates on a 'no win, no fee' basis. One person from this group found that the process was inexpensive as the advocate involved 'had never sent an account'.

Parties were also asked if they thought that the adjudication process was straightforward. Of those who answered this question, 50 percent of employees and 62 percent of employers thought that adjudication was straightforward. While this was a majority of all participants this still left a significant number for whom the objectives as set by the legislature had not been achieved.

Table 7.14: New Information for Employees at Hearing?

Employee Response	Percentage	Number
Yes	64%	18
No	32%	9
Total	100%	27

A clear majority of employees said that there was new information brought forward by the employer during the adjudication hearing. If this was the case the Tribunal was permitted under regulation 49 of the *Employment Tribunal Regulations 1991* to allow rebuttal from the applicant. Adjudicators, to cater for this possibility, were permitted to adjourn the hearing to allow the party concerned to make a fair response where the evidence could not reasonably have been foreseen.[71] An unrestricted ability to grant adjournments would have opened the process up to abuse from parties wishing to conduct fishing expeditions.

[70] For discussion on Legal Aid, see Table 7.3 and accompanying text.
[71] *Employment Tribunal Regulations 1991*, reg 49(1)(e). See also Chapter 2.4.3(c) and Chapter 6.4.8.

It should be noted that no employee surveyed was reinstated.[72]

Table 7.15: Did Employees Believe They Received Adequate Compensation?

Employee Response	Percentage	Number
Yes	32%	9
No	68%	19
Total	100%	38

To assist in determining whether the adjudication system worked it was decided to ask employees if they thought that they had received adequate compensation if their personal grievances were upheld.[73] Some employees commented as follows:

> The Courts found for me in the adjudicator Court. [The employer] refused to pay. He then took it to the Appeal Court. They once again found for me and he refused to pay. It then went to the District Court and he didn't even turn up. My lawyer is now trying to get it accepted in the High Court. It would have been fairer if he had been made to write out a cheque on the day of the adjudicator's decision. If I had owed him money, you can be sure he would have demanded his payment then and there. This man is notorious for taking things to court.

> I was adequately compensated by the adjudication but the employers company went into liquidation and I was added to the list of creditors, and received nothing.

> No because the employer has 'shit' on other people besides me and is still doing it.

> No I was ripped off by a dishonest employer.

> I had a one-year contract. The student satisfaction survey was not carried out [this particular applicant was in the teaching profession and part of the performance assessment process related to the level of student satisfaction with the applicant's teaching methods]. I was returned and then not returned [It is taken from this sentence that the applicant believed he was going to get a new contract but then found out that this was not to be the case]. I believe that the case was influenced by the political atmosphere and the desire of employers to reduce claims. It was judged that since I was not employed (one contract had finished, the other was not offered), I did not have a valid case, yet costs were awarded against the employer. It is the law and the manner of employment which created that situation. My council [sic] thought we would succeed but the court was moving to support employers.

Table 7.16: Did Adjudication Resolve the Personal Grievance? – Applicants

Adequate	Personal Grievance	Percentage	Number

[72] See Chapter 5.4.7(b) regarding reinstatement sought and granted.
[73] See Chapter 6.4.12(c) for a discussion on how adjudicators awarded compensation.

compensation?	resolved?		
Yes	Yes	29%	8
Yes	No	4%	1
No	Yes	11%	3
No	No	57%	16
Total		100%	28

Applicants were asked if compensation awarded was adequate and if this resolved the personal grievance. In 29 percent of cases it was reported that the compensation received was adequate and the personal grievance had been resolved. A correlation was drawn on a percentage basis between all applicants who responded to the survey in respect of their responses to questions about compensation, resolution, and representation. This revealed that in 21 percent of all survey responses, those who reported that the compensation was adequate and that the personal grievance had been resolved also reported satisfaction with their representative. Those who were of the opinion that the compensation was adequate, the personal grievance resolved but still reported dissatisfaction with their representative made up only 7 percent of all responding applicants.

From Table 7.16 it can be seen that in 4 percent of cases, applicants reported that they thought the compensation received had been adequate but that they did not believe the personal grievance had been resolved satisfactorily. Working the same correlation as above revealed that all of this group were nonetheless satisfied with the standard of their representative.

In 11 percent of cases, as listed in Table 7.16, it was reported that the personal grievance had been resolved but adequate compensation had not been received. In all

of these cases the applicants also reported being satisfied with the standard of representation they received.

In the majority of cases, 57 percent, it was recorded that there had been inadequate compensation in the view of the surveyed party, and that the personal grievance had not been resolved. When the questions relating to resolution, compensation, and representation were combined, the data showed that 63 percent of those within this group were happy with their representation whilst the remainder were not.

Although applicants' satisfaction with the standard of representation was high, there was a very high rate of dissatisfaction with the results of personal grievance adjudication and this therefore raises the question as to whether this dissatisfaction is related to the process itself. Despite this, from the figures it would seem that representation was not a negative factor in the minds of applicants in general.[74]

The statistics show that even in cases where the personal grievance was felt to have been unresolved and where there was dissatisfaction with the level of compensation awarded, this did not necessarily reflect feelings of dissatisfaction with the representation received. This raises the question as to what type of behaviour a representative would need to engage in before they crossed the threshold that would make them likely to be seen by the applicant group as having provided an unsatisfactory service.

[74] Alternative methods of resolving personal grievances were the topic of a later question in the survey and are discussed 7.6.4.

One applicant who reported representation as being unsatisfactory was of the opinion that the personal grievance was unresolved and the compensation received was inadequate. Commenting on their representative's behaviour they said, 'He thought we could not lose – did not ask me to get witnesses to come in'. The same applicant also stated, with regard to mediation, that they '[were] never given a [sic] option – he [the representative] wrote to my employer'. On the matter of costs this applicant replied that the process was 'very expensive for what I got'.

Another applicant reporting dissatisfaction with their representative stated, '[I] don't believe my lawyer considered my case serious or of importance, bad preparation and took too long to go to court'. This applicant when reporting on mediation stated that they 'weren't aware of such legal procedures', they felt ambivalent as to whether the costs were inexpensive as legal aid had been used but were of the opinion that their lawyer's fees were high. As to whether they perceived the adjudication process as straightforward, this particular applicant was moved to reply that 'the process was; my lawyer wasn't.'

A final example has been drawn from the responses of an applicant who had used her own lawyer who was not an employment law specialist. This applicant's explanation of her dissatisfaction with her representation was, 'Not forceful enough, intimidated by the judge and the opposition – I still wish I had conducted my own case, with legal advice'. This applicant reported the mediation process as being unsuccessful because, 'The respondent just told barefaced lies that my lawyer could not cope with'. On costs, she reported that the adjudication had not been inexpensive and that although they had been granted legal aid she 'had to repay it when I sold my house'. This particular applicant was also unimpressed with the adjudicator of the case, stating,

'The adjudicator took almost a *year* to give his opinion – *completely* unacceptable' (emphasis as provided).

Table 7.17: Did Adjudication Resolve the Personal Grievance?

	Yes	**No**	**Total**	**Number**
Employee	39%	61%	100%	28
Employer	67%	33%	100%	31

Table 7.17 shows that the responses from employers and employees were almost a mirror image of each other. (However, 19 percent of employers did not answer this survey question). Clearly, employers took a more positive view of the adjudication system as less than half of the responding employees stated that the personal grievance had been resolved.

In hindsight, the framing of the question, 'In your opinion did the adjudication process finally resolve the personal grievance?' may have resulted in the term 'finally resolved' being interpreted differently by the various survey groups. It could be, for example, that those participants who were working from a legal background would see 'resolution' as the Tribunal having made its decision, and responded to the survey accordingly, while those participants who were either applicants or respondents may have been reporting their personal feelings on the outcome. In order to address this concern the results from the survey questionnaire were broken down to illustrate how a particular group would respond to the question.

The low figures for a sense of resolution can be explained if it is accepted that few cases with little merit proceeded to adjudication.[75] If that were the case, it could have been expected that the Employment Tribunal would predominantly be involved in deciding cases of competing merit or 'borderline' cases, on the basis that if the answer to the rights and wrongs of any particular case was obvious then, apart from the 'bloody minded' participant, it would be resolved at mediation.

The question as framed required a yes/no answer, however several responses from this group included extra information that provided further illustration and arguably qualified the response. In one questionnaire where the respondent had circled yes as their answer as to whether the personal grievance had been resolved, the respondent then went on to say 'because I fired him'. In another case where the response to the question of resolution was in the negative the respondent felt that 'the court was biased in favour of the employee'.

Survey responses from representatives showed that the majority, 83 percent, interpreted the term 'resolved' to mean that resolution occurred when the Tribunal made a decision, regardless of the outcome. This is supported by one representative's response that, 'It's not a matter of opinion, a decision had been made'. Further, several members of the representative group who reported that no resolution had been achieved went on to comment that the particular case in question had gone on to appeal, the inference being that resolution would occur when a final decision was reached by the Court.

[75] See Chapter 6.8.9.

Degree of satisfaction may have related to factors over which there was little control, such as the procedure itself, which was stipulated in the legislation and regulations,[76] or the formal approach that had been adopted by those conducting the procedure. It has also to be remembered that the *Employment Contracts Act 1991* was ushered in alongside the National Government's Economic and Social Initiative policy. These pieces of legislation were the basis of substantial social engineering, the results of which were seen in some quarters as; an impoverishment of those already struggling in the system,[77] an increase in the number of the unemployed,[78] and the disestablishment of legal necessity for employee's institutions such as their unions, in a time of high unemployment. These factors may have contributed to the negative perception of the relevant employees who expressed dissatisfaction with the standard of representation and the higher rate of satisfaction that was expressed by employers in their representatives. It is open to suggest that the expectations of the employee group were low and that resolution of the matter totally in their favour may not have been a perceived outcome on their part. However, there were at the time competing claims from employers that the personal grievance process was oriented in favour of the employees; this matter is discussed more fully in Chapter Eight.

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[76] *Employment Contracts Act 1991*, Part 3, Personal Grievances, and *Employment Tribunal Regulations 1991*.

[77] See Pete Walker, 'What Happens When You Scrap The Welfare State?" *Independent*, 13 March 1994, 17, where it was stated that 'those in poverty rose from 360,000 in 1990 to 510,000. In 1993, about one seventh of the population. And ECA pay cutting meant that a family in the poorest fifth had lost 20.9 percent of its income.'

[78] Brian Roper, '*Economic Rationalism*' *in New Zealand; Impact on Employment and Industrial Relations*, 5 (Australasian Political Studies Association Annual Conference, Monash University, Melbourne, 1993) which gives the figure of real unemployment as 18.4 percent for 1993. Ellen Dannin, *Working Free; The Origins and Impact of New Zealand's Employment Contracts Act* (1997) citing Jane Kelsey, *The New Zealand Experiment*: *A World Model for Structural Adjustment?* 171: states that the level of unemployment continued to remain at a high level into 1997.

Employers participating in the survey who fell into the group expressing dissatisfaction with the adjudication process made up 10 percent of the total respondent figure and seemed to be more scathing in their comments. For example, one of these employers took the view that the adjudication system was '[a] waste of time', 'very expensive' and that 'our experience led us to go in to Wellington to seek advice from [our] member MP. Our story is very long and the system let us down badly.' Another employer complained that 'the case was spread out over a number of weeks because the time allocated was not sufficient' and they further took the view that 'the Court goes to extreme lengths to find against the employer regardless of proven evidence and witness testimony.'

It has been acknowledged that 'justice delayed is justice denied.'[79] However, whether or not the personal grievance adjudication was 'quick' might in some cases have been a matter of perception for the participants. For the lay person it may have appeared that the process was slow, however in terms of realistic time constraints for resolution of legal disputes the time lapsed may not have been unreasonable. A number of factors may have contributed to delays. The process of lodging a personal grievance and waiting for a hearing generally took the most time. Most Employment Tribunal districts had waiting lists for the allocation of adjudication hearing dates.[80] The adjudication hearing itself was not generally protracted but waiting for the decision to be produced by the adjudicator could have taken some time.[81] For example, one adjudicator commented that in an extreme case another adjudicator had taken two

[79] This quote is attributed to British Prime Minister W E Gladstone (1809–1898). See also Chapter 8.2.2 for a discussion on the impact of delay on access to justice.
[80] See Chapter 5.4.9.
[81] See Chapter Five, Table 5.38 and related text. See also Chapter 6.4.10; Time Lapse.

years to produce a decision.[82] It should be noted, however, that lengthy delays in producing decisions were not the norm.[83]

Participants were not specifically asked their reasons for their views, so not all commented on their experiences in their own words, however there were a number of possible explanations for the procedure having appeared complicated to the majority of employees. The legal requirements regarding the notification of the personal grievance to the employer and lodging the personal grievance with the Employment Tribunal were prescribed by regulations, which the lay person would be unfamiliar with and likely to find daunting.[84] The hearing process itself may have seemed similarly unfamiliar and complicated. If the employee was represented by an inexperienced representative it is possible that the procedure may have appeared more complex than it actually was, or the perception may have been the result of not having been clearly advised of what to expect in the hearing itself. Competent representation would be more likely to give the impression of straightforwardness. In some cases the nature of the issue in question may have meant it was able to be quickly resolved.

Only thirty percent of employers who thought the personal grievance was not resolved described the process as straightforward. This may well have been as a result of the outcome of the personal grievance, as well as the factors discussed in the context of

[82] Interview with Employment Tribunal Adjudicators stored on NUD*IST held in the possession of the author. The particular interviewee can not be identified as confidentiality was promised to all adjudicators prior to interview.
[83] See Table 5.38.
[84] *Employment Tribunal Regulations 1991*.

employees above.[85] In all cases the analysis is speculative because of the low response rate to the survey.

7.6 REPRESENTATIVES

Representatives' views were obviously important to give a balance to the views of lay participants in the adjudication process, although views within the ranks of representatives would, of course, also be varied. The response rate for representatives was higher than for the applicants and respondents at 36 percent.

Table 7.18: Which Party did the Representative Act for?

	Applicant		**Respondent**		**Both**[86]	
Counsel	23%	25	42%	46	10%	11
Advocate	6%	6	7%	8	3%	3
Union Counsel	4%	4				
Union Advocate	5%	5				

Total for whole table = 100%, 109 replies

Table 7.18 shows that the majority of representatives that replied to the survey were acting as counsel in adjudication. The total number of representatives who replied to the survey was 109. Approximately 75% of the representatives involved in adjudication were counsel who had been chosen by parties as their representative. This question was asked to ascertain whether the responses varied according to whether the representative was representing the applicant or the respondent. It is worth commenting here that some trade unions either employed advocates or counsel as staff members or contracted representation services from outside their organisation.

[85] For a discussion on the results of personal grievances, see Chapter 5.4.6.
[86] Some representatives surveyed indicated they regularly represented both employees and employers. There were sufficient responses to warrant a separate category, 'both'.

This may have meant that the union determined who the party would be represented by.

7.6.1 REPRESENTATIVES AND GROUNDS FOR PERSONAL GRIEVANCES

Table 7.19: Did the Representative Believe that there were Grounds for the Personal Grievance?

	Yes	No	Unknown	Total	Number
Counsel	51%	34%	15%	100%	82
Advocate	50%	33%	17%	100%	18
Union Counsel	100%	–	–	100%	4
Union Advocate	100%	–	–	100%	5

This question was asked to ascertain whether representatives believed that there was validity in the case that they advocated. The data collected is significant in that it has shown that in a third of the cases the representative went to adjudication with the belief that their client's case had no merit. The absence of further questioning meant that it was not possible to determine whether this had impacted on their conduct of the case (and, arguably, potentially its outcome.) It should be noted though that the representative's view was not necessarily conclusive, as in the final analysis the validity of the grounds was determined by the Employment Tribunal. Table 7.19 clearly shows that the majority of representatives believed that the case which they advocated was valid. It also shows a striking similarity in the range of responses of both advocates and (non union) counsel.

For those representatives who believed there were no grounds for the personal grievance it is argued that it would have been reasonable to expect a significant difference in the figures between counsel and advocates. For legal counsel, practice

was (and is) governed by Rule 1.02 of the Rules of Professional Conduct for Barristers and Solicitors which provided, amongst other things, that a practitioner must be available to the public and must not refuse to act without good cause.[87] The accompanying commentary to this rule provides that good cause arises only where: counsel cannot attend to the client's needs promptly; counsel does not possess the due competence to carry out the work required; where a conflict of interest exists; or where counsel has too many other commitments. Therefore, in the absence of any of these circumstances the practitioner was obliged to present the case to the tribunal cases regardless of any personal assessment of their validity.

In comparison, an advocate was not bound by these rules and therefore had the freedom to accept or reject cases. It is therefore of note, given the ability to reject those claims which, in their opinion, were without valid grounds, that the figures for the percentage of claims that advocates took to adjudication were only slightly less than that for counsel.

There are other possible explanations for a representative taking a case to adjudication which they believed had no grounds. Despite the best advice from their representative some clients insist on taking their case further in the face of potential risks. Further, the financial realities of practice may override any moral objection and the ethos of legal practise is that the representative's view of the merits of the case should not influence the person's right to have their 'day in court'.

[87] *New Zealand Law Society*, (4th ed, 1996).

It is important to remember, however, that the representatives' comments referred to a particular case and may not, therefore, have mirrored their opinion of the merits of cases generally.

Table 7.19 also shows that all union representatives, whether advocates or counsel, believed that there were grounds for the personal grievance. The purpose of asking this question was to determine whether union representatives were more or less likely to believe that their client's claim was valid. However, this data should be treated with caution as the response group was numerically small.

The apparent difference between union representatives and other representatives on this point might be explained by the Unions' practice under the *Labour Relations Act 1987* of trying to resolve the issue 'on the job' and only taking the matter to adjudication if it had passed their internal screening process.[88] The likelihood of a union representative taking a case without merit to adjudication might therefore have been reduced.

Table 7.20: Did the Representative (for either party) believe there were Grounds for the Applicant Pursuing a Personal Grievance?

		Yes	No	Number
Counsel	*Applicant*	100%	–	24
	Respondent	35%	65%	43
Advocate	*Applicant*	100%	–	6
	Respondent	14%	86%	7
Union Counsel	*Applicant*	100%	–	5
Union Advocate	*Applicant*	100%	–	4

[88] Telephone conversation with Ross Wilson, President CTU, 30 January 2006.

Representatives were asked whether or not they believed that there was substance to the applicant's case. The small number of representatives who had acted for both applicants and respondents has been excluded from this table. Only advocates and counsel acting for respondents reported that they did not believe that there was substance to the applicant's case. As previously discussed, counsel had little discretion over which cases to take up as they were bound by the Rules of Professional Conduct, whereas advocates were not bound by such restrictions, and generally had more flexibility in who they chose to represent. Advocates may have been able to avoid representing respondents more easily where they believed the applicant's personal grievance was well founded and the respondent's position untenable. A note of qualification should be sounded here that such a proposition would not be applicable, for example, to 'in-house' advocates who were permanently in the employ of a respondent.

All representatives who were either union advocates or union counsel, and therefore only represented applicants, believed that there were grounds for the personal grievance.

7.6.2 Fees and Costs

Table 7.21: Was the Applicant Legally Aided?

Response	Percentage	Number
No	89%	97
Yes	11%	12
Total	100%	109

Table 7.21 shows that legally aided applicants represented 12 people; a very small proportion of those surveyed who took a personal grievance to the level of

adjudication in 1997.[89] One of the reasons for this low level of assistance may have been that when represented by an advocate, parties did not (at that time) qualify for legal aid.[90] If an applicant was represented by counsel they would qualify for legal aid provided their assets and income were below the recommended level.[91] Few employers would qualify because of the low income thresholds imposed by regulation.[92]

Table 7.22: How were Fees Determined?

Hourly	42%
Time	19%
Union Fees[93]	8%
NZLS Rules of Conduct	9%
Legal Aid	6%
Contingency	2%
Contract	4%
Other	10%
Total % Total number	100% 104

Table 7.22 illustrates how all representatives surveyed determined how they charged fees to their clients. The New Zealand Law Society Rules of Professional Conduct described the factors applicable to setting legal fees.[94] Rule 3.01 provided:

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[89] For a discussion on general topics see Chapter 5.4.1, Table 5.1. For a discussion on the availability of legal aid in personal grievance claims, see Chapter 2.4.3(d) and Chapter 5.4.8(a).
[90] For a discussion on the availability of legal aid in personal grievance claims, see Chapter 2.4.3(d) costs and Chapter 5.4.8(a). Note, the Legal Services Agency, under ss 69 and 70 *Legal Services Act 2000*, may now approve non-lawyer personnel, such as qualified legal executives, paralegals, and law clerks, to provide services to clients and receive remuneration from the agency in certain circumstances. This was not the case at the time this survey relates to. At that time the rules were governed by s 158F *Legal Services Act 1991* which only made provision for those holding annual practicing certificates who had been approved and forwarded to the Legal Services Agency by the District Law Society. Telephone discussion with Ian Thompson, Employment Services Advocate, Christchurch, 24 April 2006. About thirteen advocates are at the time of writing on the list of approved legal aid providers.
[91] Ibid.
[92] Ibid.
[93] Union membership subscriptions.

> A practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner.

The commentary to this rule provided that 'charges must be fair and reasonable in all the circumstances.' Practitioners were referred to the Society's Conveyancing Practice Guidelines. The 'Principles of Charging' set out in the guidelines included:

> Charges by a lawyer for professional work shall be calculated to give a fair and reasonable return for the services rendered, having regard to the interests of both client and lawyer. Charges shall take account of all relevant factors, including:
>
> a) the skill, specialised knowledge, and responsibility required
> b) the importance of the matter to the client and the results achieved
> c) the urgency and circumstances in which the business is transacted
> d) the value or amount of any property or money involved
> e) the complexity of the matter and the difficulty or novelty of the questions involved
> f) the number and importance of the documents prepared or perused
> g) the time and labour expended
> h) the reasonable costs of running a practice

The weight and emphasis given to each factor would have depended on the circumstances of the case and how the practice operated. In addition to fees charged by representatives all clients were also obliged to pay goods and services tax (GST). This added an extra 12 percent to the cost of representation.

Table 7.22 shows that 9 percent of representatives said that they followed the New Zealand Law Society Rules of Conduct but did not provide any illustration of how this worked. The table shows that the majority of representatives set their fees by some form of time mechanism. One variation of this method included a fixed charge plus an hourly rate, for example, a fixed charge of $200 for bringing a personal grievance, with an additional $250 per hour for time spent.

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[94] New Zealand Law Society, *Rules of Professional Conduct* (4th ed) 1996.

Overall, 42 percent of representatives advised that they used an hourly rate to set their fees. In addition, a small number of other representatives (1 percent in each case) charged an hourly rate plus extra charges, for example percentage of winnings, value of case and the ability to pay was taken into account. On one occasion the time rate was discounted.

In all, 8 percent of representatives replied that they set the fees based on time spent on the personal grievance as a whole.[95] It is not really clear how this time element was calculated. For instance, 7 percent of representatives said that they charged for time and attendance. Presumably attendance simply meant the time spent attending meetings, mediation and adjudication. Other representatives gave additional factors which included fees adjusted for success, for complexity of the case, urgency or importance. In addition, some representatives advised that fees were reduced to a fair level based on their original estimate of costs and returns.

Table 7.22 shows that the majority of representatives calculated their fees on some form of time spent basis. There were a significant number of variations as to how this was calculated. In 20 percent of the responses received, other ways of setting fees were indicated, for example, by way of contingency fees. The remaining 4 percent of responses comprised those who had paid no fee. A few had not replied to the question.

After all factors have been taken into account the time element was clearly the one most favoured by representatives. From an access to justice perspective it is of

[95] See Chapter 2.4.3(d) for a more detailed discussion on fee fixing.

concern that such a low percentage of representatives' fees were paid by legal aid or through union fees. This concern is reinforced by some of the comments made by adjudicators, outlined in Chapter Six,[96] about the tendency of some lawyers to prolong the process.

7.6.3 PROCESS

Table 7.23: How did Representatives Describe the Process?

Response	**Percentage**
Confusing	6%
Formal	44%
Informal	14%
Legalistic	25%
Intimidating	4%
Time-consuming	28%
Satisfactory	62%
Other	10%
Number	109

The figures in Table 7.23, and the comments underlying them, show that nearly two thirds of representatives surveyed found the adjudication process to be satisfactory, although it was also commonly described as formal and time-consuming. Each representative could choose as many descriptors as they thought appropriate. This does not fully accord with the legislator's intentions, although the level of satisfaction is greater than for applicants and respondents.[97]

Table 7.23(A): How did Types of Representatives Describe the Process? (as a percentage of the total representative response)

Response	**Counsel**	**Advocate**	**Union Counsel**	**Union Advocate**
Confusing	4%	22%	–	–

[96] See Chapter 6.4.1–6.4.7

[97] For discussion on the intentions of the *Employment Contracts Act 1991* see Chapter 2.3.1; Political Development and Chapter 6.4.1; Nature of the Adjudication Process.

Formal	41%	39%	75%	80%
Informal	13%	17%	–	20%
Legalistic	18%	33%	50%	80%
Intimidating	1%	17%	–	20%
Time-consuming	24%	50%	–	20%
Satisfactory	68%	33%	75%	40%
Number	82	18	4	5

The majority of legally qualified representatives took the view that adjudication was satisfactory. However, counsel also thought that adjudication was formal and time-consuming. In comparison to counsel only a small number of advocates (six) thought that adjudication was satisfactory. This may have been because advocates did not hold a practicing certificate although they may have held legal qualifications.[98] It is possible that formal legal training allowed counsel to feel more comfortable with the adjudication process.

Union advocates and union counsel were employees of the relevant unions, or contracted by them, and comprised the smallest group of survey responses. It was not always possible to determine where a union representative was employed. The figures show that contrary to the intentions of parliament only a small number of union representatives found that adjudication of personal grievances was satisfactory and those who held that opinion tended to be those with legal qualifications.

To assess further how representatives viewed the adjudication process, representatives were asked for their views in terms of the Government intentions: was the process quick, inexpensive, and straightforward?

[98] See Chapter 5.4.4; Representation, for a discussion on types of representatives.

Table 7.24: Representatives' Views of the Adjudication Process

Response	Yes	No	Total	Number
Quick	30%	70%	100%	107
Inexpensive	27%	73%	100%	103
Straightforward	73%	27%	100%	91

According to most representatives surveyed, apart from the responses on straightforwardness, the government's intentions were not met. The logical explanation for the representatives' much more positive view of straightforwardness is that they were working within the system frequently and would therefore have become used to its complexities. In comparison, applicants and respondents may have used the personal grievance system only once in their working lives.

It was decided to consider whether the geographical area in which the personal grievance occurred, may have had an impact on how the representative viewed the process. The following table is a breakdown of the figures in Table 7.24 into regional areas according to Employment Tribunal jurisdiction.

Table 7.25: Agreement on nature of adjudication process by regional area

Response	Auckland/ Hamilton	Wellington	Christchurch/ Dunedin
Quick = Yes	31%	29%	28%
Inexpensive= Yes	28%	29%	50%
Straightforward= Yes	81%	85%	50%
Number	66	29	33

As this table shows, the regional figures mirror the national totals except for Christchurch/Dunedin, where the percentage of representatives who found the process straightforward was significantly lower. Unfortunately, the data did not reveal the reasons for this point of difference, which may have been a result of the way the local

Employment Tribunal offices organised and managed the procedure, or a more random result because of the low sample size. Differences in results for Christchurch and Dunedin in total 1997 cases had been identified.[99]

As the information in Table 7.25 is focussed on the individual aspects of the question, perhaps a better view of how the process performed in comparison with the government's expectations could be established from combining the various permutations available to representatives when they answered the question in full. The following table gives the figures on a nationwide basis for the largest groupings.

Table 7.25(A): Representatives' Views (nationwide)

	Percent	Number
Neither Quick nor Inexpensive, but Straightforward= Yes	32%	31
Neither Quick nor Inexpensive nor Straightforward= Yes	25%	20
Quick and Inexpensive and Straightforward= Yes	14%	13
Not Quick, but Inexpensive and Straightforward= Yes	11%	10

The representatives' choice of descriptors does not support a view that the government's predictions in respect of speed, expense and straightforwardness were correct.

On the matter of speed, the following comments were made:

> The process was not quick because 'time delay between hearing date and problem occurring.' (Advocate)
>
> Time involved in mediation. (Advocate)
>
> Legal profession built up fat portfolio to accumulate costs. (Advocate)

[99] See Table 5.12. In Christchurch, a smaller number of adjudicators completed a similar workload to elsewhere, in Dunedin results were skewed by a small number of unusual cases.

> There was approximately a four-month delay from filing defence through to the hearing on preliminary issues. In legal terms, that is reasonably efficient, although members of the public would not consider it to be so. (Counsel)
>
> It took over six months to resolve the personal grievance. (Counsel)
>
> Detailed evidence required, waiting time for fixture, cross-examination required. (Counsel)

On the issue of expense the following comments were recorded:

> [The] small chamber for dispute resolution has been transformed into a rich hunting ground ripe for exploitation by legal fraternity. Employees can no longer read menu or afford price of admission. (Advocate)
>
> Legal matters are never inexpensive to resolve and this was probably no different. (Counsel)
>
> Was expensive in terms of downtime for the respondent partners and staff. (Counsel)
>
> Applicant was unable to recover money awarded, so lost out over all. (Counsel)

On the matter of straightforwardness, representatives remarked:

> The adjudicator made life very difficult for both parties. (Advocate)
>
> ...it was necessary to argue the preliminary issues before the Employment Tribunal which involved some novel and interesting areas of law surrounding delay and whether or not applications should be struck out. (Counsel)
>
> Would have had to have been a lawyer to understand what was happening at the hearing. (Counsel)

From these comments, it is possible that Counsel themselves experienced no personal difficulty with the straightforwardness of the process, but rather that they were considering the question from their client's perspective.

Table 7.25(B): Breakdown of Responses by Representative Type – Quick

Response	Counsel	Number	Advocate	Number
Yes	32%	26	19%	3
No	68%	56	81%	13
Total	100%		100%	

Table 7.25(B) outlines whether or not representatives at adjudication thought that the process was quick.[100] Only 32 percent of counsel responded positively. This might have depended on the nature of their practice. In comparison with some other procedures, such as a civil litigation trial, adjudication could have seemed quick. The number of advocates, union advocates and union counsel who believed the process to be quick was even lower than the figure for general counsel. This may have been because union advocates and counsel worked only in this area with little comparison to other types of judicial process.

Table 7.25(C): Breakdown of Responses by Representative Type – Inexpensive

Response	Counsel	Number	Advocate	Number
Yes	25%	20	20%	3
No	75%	60	80%	12
Total	100%		100%	

Representatives were asked if they thought that adjudication was inexpensive. The significant figure in these results was the similar proportion of counsel and advocates who said that adjudication was expensive.

[100] For a discussion on time lapse see above, 7.5.6. See also Chapter 5.4.9.

Table 7.25(D): Breakdown of Responses by Representative Type – Straightforward

Response	**Counsel**	**Number**	**Advocate**	**Number**
Yes	82%	58	45%	5
No	18%	13	55%	6
Total	100%		100%	

Representatives were also asked whether they believed that adjudication was straightforward. Numbers are too low for reliable analysis, but the lower number of advocates, union counsel and union advocates who found adjudication straightforward may have been explained by the contrast between the conciliation system which applied under the provisions of the *Labour Relations Act 1987* and the more legally complex process under the *Employment Contracts Act 1991*.[101] These figures have shown that counsel generally strongly took the view that adjudication was straightforward, however they should be read in the context of some of their quoted comments quoted above.

Table 7.26: Did Representatives Believe that Adjudication Resolved the Personal Grievance?

		Yes	Number	**No**	Number	Total
Counsel	*Applicant*	76%	19	24%	6	100%
	Respondent	66%	34	34%	7	100%
Advocate	*Applicant*	66.6%	4	33.3%	2	100%
	Respondent	88%	7	12%	1	100%

Table 7.26 shows which party the representative acted for, whether the representative thought the personal grievance had finally been resolved, and records the responses as a percentage of the type of representative surveyed but small numbers make it uncertain whether the apparent proportionately greater number of counsel who

[101] See Chapter 2.2.2 for a discussion on personal grievance procedures under the *Labour Relations Act 1987*.

believed that adjudication resolved the personal grievance for applicants would be reflected in the full set of 1997 data.

Table 7.27: Did Representatives Believe that there was a More Effective Model to Resolve Personal Grievances?

Model	Counsel	Number	Advocate	Number
Approved	69%	44	33.3%	2
Investigative/Inquisitorial	20%	13	–	0
Mediation	11%	7	17%	1
Other	–	–	50%	3
Total	100%	64	100%	6

Table 7.27 shows that counsel made up the greater proportion of representatives who approved of adjudication under the *Employment Contracts Act 1991*. Only a few advocates and union counsel shared that view. A large number of participating representatives provided some qualifications to their approval and had other ideas as to how the system could have worked more effectively. For example provision of better funding, less waiting time for hearings and compulsory mediation were suggested. Six participants either favoured mediation or a return to the system used under the *Labour Relations Act 1987*.[102]

7.6.4 Other Approaches

The *Employment Relations Act 2000* introduced a new method of resolving personal grievances which involved mediation by the Mediation Service and an investigative approach being taken by the Employment Relations Authority.[103] The personal

[102] See Chapter 2.2.4 for a discussion on the definitions of personal grievances under the *Labour Relations Act 1987*.
[103] *Employment Relations Act 2000*, Part 9; Personal Grievances.

grievance procedure applicable under the *Employment Relations Act 2000* will be discussed in Chapter Eight.[104]

The process under the *Employment Relations Act 2000* incorporates a number of the suggestions made by representatives on a more effective model for resolving personal grievances. Another suggestion for dealing with personal grievances was a case management/investigative approach. As the management of cases in this manner often resolved personal grievances prior to them having to reach adjudication a combination of this method and investigation may have been an appropriate resolution process.[105] Two more suggestions for resolving personal grievances were inquiry and inquisitorial. The precise nature of what was intended by those responses was not clear. However, it appears that their idea was that the Employment Tribunal be given an investigative function rather than only an adjudicative role. Suggestions for mediation and adjudication and mediation/counselling made by both counsel and union counsel coincide to some extent with the *Employments Contracts Act 1991* system as it was. Adequately funded adjudication was another favoured solution with others suggesting that removal of lawyers from the process altogether would be a beneficial approach. The merits of the various alternative suggestions will be discussed in Chapter Eight.

7.6.5 SELF REPRESENTED PARTIES

Only one applicant party of the 28 applicants who replied said that they chose to represent themselves.[106] The respondent employer in this case thought that there were

[104] See Chapter 8.4.5.
[105] See Chapter 6.4.6 for a brief discussion on the case management approach.
[106] Some participants in the survey who represented themselves completed the wrong form and were excluded from the survey.

no grounds for the personal grievance taken against them and that cost was a factor in determining representation. The applicant said that she/he was not a member of a union and therefore was not entitled to union representation or funding. This self representing applicant described the adjudication process as legalistic. The respondent employer had previous experience in mediation but did not advise why mediation had been unsuccessful in this case. The respondent believed that adjudication had finally resolved the personal grievance and that the process was inexpensive, straightforward, but not quick. The respondent advised experiencing no difficulties with the adjudication process and no alternative as to how procedures may be improved were suggested.

7.7 CONCLUSIONS

Chapter seven has examined the contrasting perspective of employees, employers and their representatives to determine their views on the efficacy of the system. What the survey attempted to do was, for the first time, obtain the views of participants in the personal grievance procedure and to ascertain their opinions on whether the process was accessible, satisfactory and whether it met participants' expectations. The survey's narrow focus upon 150 cases in a one year period is a useful snapshot of opinion at the time. A wider survey may have produced more diverse views from mainly one-off users (employers and employees) but the overview from the representatives who had experience of other cases was mainly consistent.

Responses around how employees and employers chose their representatives and the level of representation utilised was useful in order to ascertain perceptions of how

accessible the system was and also useful to highlight balance of power issues including affordability factors and the competence variables of representatives.

The more focused questions around the adjudication process and employers and employees' perceptions of the complexity of it starkly indicated how short the process fell from the parliamentary ideal of an accessible, inexpensive and essentially 'user friendly' system. The representatives had a markedly different perception in response to the questions, which was not surprising due to their background/training and the fact that they were often frequent users of the system and familiar with its operation and shortcomings. Interestingly, the questions highlighted significant consensus between representatives and adjudicators around some deficiencies in the process. Aside from complaints about the behaviour of some representatives, all survey participants were fairly critical of systemic shortcomings of the process.

The relatively small number of responses received may have been due to the possibility that participants were generally satisfied with the process and outcome of their cases or that recollection was too traumatic to contemplate or time lapse and people wanting to simply 'move on' being at issue. Some survey respondents did, however, indicate levels of approval with the adjudication system. This has assisted with answering the thesis question of what participants experiences were when using adjudication and whether the adjudication system worked for them.

As indicated by the responses received from representatives to this survey, this group indicated most approval for the adjudication process. By contrast, a significant number of employees and employers surveyed did not altogether share this view. The majority of employers and employees thought the process was slow, expensive and

overly legalistic. This indicates that the government's intention that adjudication be quick, inexpensive and straightforward was not achieved to the satisfaction of the crucial user parties.

Representatives were the group who showed the greatest overall level of support for the adjudication system. They tended to feel comfortable with the formality of the process probably due to their legal background and training but they did indicate that the process was at times too cumbersome and in some cases too slow. It needs to be borne in mind that in comparison to other types of civil cases the delays experienced by parties in adjudication were less pronounced. Likewise, adjudication may not have appeared significantly costly by comparison with other civil jurisdictions. However, it needs to be remembered that few employees qualified for legal aid and the cost of taking a personal grievance could have been prohibitive. When asked what would be an ideal process for resolving personal grievances, many representatives, however, took the view that a less formal investigative process would be more suitable. Some representatives recommended that mediation be made compulsory, with others preferring a return to the conciliation system which existed under the Labour *Relations Act 1987.*

It appears from the survey conducted that whilst some support existed for the adjudication system used under the *Employment Contract Act 1991,* support was not strong and generally speaking, participants did not believe that the intentions of the Government of the day had been met.

Chapter Eight will focus on the issues raised and discussed throughout this thesis. It will also identify changes made to the personal grievance system through the

Employment Relations Act 2000 and will determine whether identified shortcomings in process have been rectified. Chapter Eight will also briefly identify some of the legislative changes which are currently being considered by the National Government and consider what impact they may have on the resolution of personal grievances.

CHAPTER 8

C h a p t e r 8

SUMMARY OF FINDINGS

8.1 INTRODUCTION

This chapter draws together the conclusions from Chapters Three, Five, Six and Seven. The findings of the research are presented and the major issues and themes are identified concerning how the adjudication system under the *Employment Contracts Act 1991* measured up as a substantive piece of employment law in relation to personal grievances. Comparisons are made with other studies undertaken in this area to determine whether the findings contained in this thesis are consistent with the research findings of others. The main questions of the thesis that underlie the results are:

- What were the experiences of participants using the personal grievance adjudication procedure?;
- Did the personal grievance adjudication system work in the manner intended by the government of the day for those participants?; and
- By identifying the effective features and negative aspects of the process, to determine whether the procedure benefits not only policy makers, but all participants in the personal grievance adjudication system.

This chapter concludes with a brief reflection upon why the *Employment Relations Act 2000* was introduced and whether the problems with the *Employment Contracts Act 1991* identified in this thesis in relation to personal grievances have been addressed and resolved.

8.1.1 Reasons for Conducting the Research

To ensure that the above research questions were answered, it was necessary to look at how the Employment Tribunal worked and whether the process met the expectations of parties using the system. This involved a broad examination of the legislation and decisions, and whether participants were satisfied with the process and its outcomes.

8.1.1(a) Government Objectives

The objectives of the National Government were to establish a system for resolving personal grievances that was quick, straightforward, and inexpensive. One of the main aims of this thesis was to determine whether those objectives were met. This involved questions of access to justice and people's ability to access the system. For example, were people aware of their rights?; was the procedure sufficiently informal and flexible to cater for particular circumstances and target groups?; were outcomes sufficient in terms of expenses involved in bringing a personal grievance compared with the remedies awarded?; and was the system of allocating costs fair? These questions relating to the process also focussed on issues of natural justice such as the right to be heard and respond, the right to a neutral determination, and whether cross-examination was permitted.

8.1.1(b) Peoples' experiences using the adjudication system

This thesis was unique in seeking to determine from participants of the personal grievance process what their views of it were and whether it had worked for them. It was important to establish any positive factors in their use of adjudication; the negative factors; and what their ideas were for improvement. This provided a unique

window into the operation of the Employment Tribunal from the perspective of participants and whether it worked in the way it was intended to.

Investigation of these questions involved a detailed analysis of the entire Employment Tribunal adjudication process both in terms of what the decisions said – objective information such as the types of personal grievance, types of representation, remedies and costs sought and granted, and procedural issues – and the resulting impacts on participants. In other words, how did participants describe the process?; did it resolve the issue at hand?; did the procedure work for participants personally?; and what were the outcomes for them? For example, the type of representation chosen may have impacted both on the outcome of the personal grievance and parties' perceptions of the personal grievance procedure. In this way, the thesis was able to examine the impacts of varying factors on the success of applicants' cases and the personal views of those involved.

8.1.1(c) Data Collection

This thesis focussed on the results of three main types of data collection with information was gathered from three different sources: the Employment Tribunal decisions from 1997, interviews with Employment Tribunal adjudicators, and surveys of participants and their representatives who had taken personal grievances in 1997. The information gathered allowed a comprehensive analysis of the Employment Tribunal and its proceedings.

Firstly, it was hoped that the objective data from the decisions (in Chapter Five) would help to illustrate whether Government objectives had been met. The objective

data built up a profile of participants and their personal grievance cases in an attempt to identify trends in the decisions made.[1] This included consideration of procedural matters such as delay, remedies, and costs.

Secondly, questions were devised from the legislative framework of Chapter Two and the objective information of Chapter Five as a basis for constructing interviews of Employment Tribunal adjudicators. This allowed adjudicators to express their opinions on matters relating to five categories: process, types of personal grievance, parties, representation, and costs. This material is found in Chapter Six.

Finally, Chapter Seven records the results from surveys of participants of the personal grievance procedure and their representatives. These surveys sought views on matters relating to process, representation, and outcomes. Again, this allowed participants to view their personal opinions on matters relating to the Employment Tribunal proceedings, although the low response rates mean that the findings cannot be generalised.

8.1.2 Were Government Objectives Met?

As discussed above, the Government objectives at the time were to create a procedure that was quick, inexpensive, and straightforward. This intention was reflected in *Employment Contracts Act 1991*, s 76(c), where the object was to establish a low level, informal, specialist Employment Tribunal. This section discusses the findings from Chapters Five, Six, and Seven in this context.

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[1]This profile canvassed information such as: who made personal grievance claims; gender of parties; how they were represented; types of respondent; types of employment; categories of personal grievance; remedies and costs sought and granted.

8.1.2(A) QUICK

Time factors were a significant feature of the personal grievance process under the *Employment Contracts Act 1991* including: the time lapse between the action that resulted in the personal grievance and the hearing date; the length of the hearing itself; and the time lapse between the hearing and the Employment Tribunal adjudicator's decision being provided. The average waiting time between the date of the personal grievance arising and the date of the hearing was over 16 months. This represents a significant waiting period, and was further exacerbated by hearings that lasted on average over one and half days, followed by a two month delay for the decision to be produced.[2] Adjudicators discussed various factors that contributed to these delays. These included an early backlog of cases from the *Labour Relations Act 1987*; availability of representatives; institutional delays and lack of resources; a procedure that required evidence to be presented formally;[3] and the impact of lawyers.[4] Approximately half of employees and employers surveyed who responded thought that the process was time-consuming for them. Further, approximately 70 percent of both parties said that the adjudication process was not quick.[5]

8.1.2(B) INEXPENSIVE

One of the main aims of the National Government was to introduce a procedure that was inexpensive to the parties involved and therefore accessible to all employees regardless of union membership. This was measured in a number of ways, each

[2] See Chapter 5.4.9. See also 5.4.4, which discusses the differing time delays in each regional jurisdiction.
[3] See Chapter 6.4.4. This was further complicated by considerable amounts of evidence presented due to the lack of a hearing *de novo* at the Employment Court. See also Chapter 6.4.9 for adjudicator's comments on the impact of caseloads on delays in the Employment Tribunal.
[4] See Chapter 6.10.
[5] See Chapter 7.5.6 and 7.5.8; and Table 7.13 and associated text. As discussed, it should be noted that this does not necessarily indicate levels of satisfaction with the adjudication process.

indicating a process that was inordinately expensive for those involved. There was large disparity between costs sought and costs granted. For example, for a hearing that lasted one day, the average costs sought was $2,576 while only $984 was awarded.[6] While there were guidelines for the award of costs laid down by the Court of Appeal, from the perspective of a dismissed employee, costs awards were frugal.[7] This is also reflected in terms of remedies sought and granted, discussed below in the context of outcomes of adjudication.[8]

The issue of expense was universal: a high number of both employees and employers responded that the process was expensive for them. 71 percent of employees and 82 percent of employers who responded to the survey believed the procedure was expensive.[9] For example, one employer commented:

> Legal and witness fees were approximately $12,500.00 and we were awarded only $1,500.00 in costs, despite winning the case.

Adjudicators questioned on whether they thought the personal grievance adjudication procedure was expensive, agreed that the cost of taking a personal grievance caused problems with accessing the procedure.[10] This was based on the costs of representation and lodging fees. How costs were awarded could cause some confusion to the onlooker, as on the one hand adjudicators agreed that costs were a barrier to accessing the procedure, while on the other hand, low costs were awarded. While adjudicators were able to take various factors into account, it should be noted that in

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[6] See Table 5.35 and related text.
[7] For a discussion on costs in this context, see Chapter 5.4.8.
[8] See below, 8.1.4(b).
[9] See Chapter 7, Table 7.13 and related text.
[10] See Chapter 6.8.1 and 6.8.2.

this respect, adjudicators were constrained when awarding costs by the limiting directions of the Court.

8.1.2(c) STRAIGHTFORWARD

A further objective of the *Employment Contracts Act 1991* was to put in place a straightforward procedure for the Employment Tribunal to follow. In response to this inquiry, 50 percent of employees and 62 percent of employers agreed that the process was straightforward.[11] Similarly, a small proportion of those surveyed who responded (21 percent of employees and 8 percent of employers) described the adjudication process as confusing.[12] These numbers were much lower where parties did not think the personal grievance had been resolved by the adjudication process.[13] In determining whether the process was straightforward for parties, more specific questions were asked in relation to procedural matters. For example, 64 percent of employees reported that new information was brought forward by the employer during the adjudication hearing, which may have required the applicant to adduce evidence in rebuttal.[14] The high dependence on counsel and advocates as representatives also suggests a process that was less than straightforward for lay-people. However, 73 percent of representatives, accustomed to working in an adversarial environment, agreed that the adjudication process was straightforward.[15]

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[11] See Table 7.13 and related text.
[12] See Table 7.12 and Chapter 7.5.1.
[13] See Table 7.26 and related text.
[14] *Employment Tribunal Regulations 1991*, reg 49(1)(e). See Table 7.14 and related text.
[15] It should be remembered that this figure does not include the fact that the majority of advocates found that the process was *not* straightforward. See Table 7.25(d) and related text. See also Table 7.23: 6 percent of representatives described the process as confusing.

Adjudicators commented on procedural problems such as unseen evidence, wrong legislation being used, and inadequate representation, as factors contributing to a process that was not straightforward, thus requiring representation of parties. However, the approach of adjudicators in assisting parties and their representatives who may have encountered difficulties with the procedure mitigated some of these effects. For example, the case management approach used in Wellington ensured some flexibility in redressing any errors that may have been presented.[16]

8.1.2(D) EMPLOYMENT CONTRACTS ACT 1991, S 76(C)

The Government intentions were reflected in the *Employment Contracts Act 1991*, s 76(c), and provided another measure of the efficacy of the Employment Tribunal. The object of section 76(c) was to establish a 'low level, informal, specialist Employment Tribunal to provide speedy, fair, and just resolution of differences.' Adjudicators were ideally placed to comment on the operation of the Employment Tribunal, and were asked to consider the nature of the procedure in light of the statutory intentions. In this respect, 75 percent of adjudicators considered that the intentions of the legislation had not been met, with the remaining 25 percent indicating the intentions had not entirely been met. To clarify, not one adjudicator interviewed agreed that the intentions of the *Employment Contracts Act 1991* had been fully met. The fact that most adjudicators thought the process was formal and legalistic, dominated by directions from the Court and the legal profession illustrates this point.[17]

The procedure of the Employment Tribunal was regulated by *Employment Tribunal Regulations 1991*, reg 49. Adjudicators were asked about the effects of this

[16] See Chapter 6.4.6.
[17] See Chapter 6.4 for details of adjudicators' views of the personal grievance adjudication process.

regulation, commenting that, for example, this could cause difficulties in the presentation of evidence. Adjudicators noted that parties almost always used written statements of evidence, which could be complex, evidenced by lawyers drafting briefs that were outside the understanding of their clients.[18]

This is underlined by the contrasting responses from representatives, particularly lawyers, a clear majority of who believed the adjudication process was satisfactory, with their clients who were mostly dissatisfied. Only 21 percent of employees and 37 percent of employers who responded to the survey thought that the adjudication procedure was satisfactory.

8.1.3 REPRESENTATION

As already observed, representatives played a significant role in the personal grievance adjudication process. The type of representation had varying impacts on the process itself, and to some extent, the outcomes. In this respect, by sheer numbers alone, counsel played a dominant role in the adjudication process. Initially, the intentions of the Government were laudable in trying to create a low level and informal system. However, the nature of the legislation and its subsequent interpretation by the Courts, led to an adversarial process suited to the legal profession.[19] In some cases, having counsel as a representative paid off: on average counsel sought and were granted higher remedies.[20]

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[18] See Chapter 6.4.4, which also notes that self-representatives were the only group that did not always use written statements due to a lack of knowledge of the process.
[19] See Chapters 5.4.4 and 7.4 for comment on the high number of parties who chose to use counsel as representatives.
[20] For example, see Table 5.28 and related text.

Opinions on the standards of representation, and the satisfaction of the parties using representation, were varied. One whole section of the interview questions related to adjudicators' views of the standard of representation and whether it was adequate for the personal grievance adjudication process. Generally, adjudicators found that standards varied across all the groups of representatives, not between the groups. Adjudicators indicated a willingness to assist inexperienced representatives and allowed some leniencies for poor representation.[21] Generally though, most parties were satisfied with the standard of representation they received, perhaps not surprising given the nature of the adjudication process making legal representation, at least in the public perception, to be necessary.[22] Thus, those who were unaware of their legal obligations were more likely to be satisfied than unsatisfied with their representation.[23]

8.1.4 Outcomes

The outcomes of the personal grievance adjudication process were measured in several ways from differing perspectives throughout the findings in Chapters Five to Seven. The general intention was to determine whether the process worked for the parties and whether parties received an adequate outcome both in terms of objective criteria and their expectations. In this way, the ability of the Employment Tribunal to resolve personal grievances was tested.

[21] See Chapters 6.7.2 and 6.7.4.
[22] Only a quarter of employees and employers surveyed indicated an awareness of their legal obligations. See Table 7.11 and related text.
[23] Ibid.

8.1.4(A) SUCCESS OF APPLICANTS

In 1997, 58 percent of all employees who took a personal grievance were to some degree successful in their claim. In other words, their personal grievance was upheld.[24] However, this is a limited analysis, as it does not consider the costs involved to the parties nor the disparity between remedies granted and expenses incurred, as highlighted in the next section. There were some factors that showed some variations in the success rate.[25] Those in the farm and trade occupational category positions had a higher rate of success than the average, followed by white collar occupations from legislators to associate professionals. As discussed in the previous section, representatives also had an impact of the success of employees at adjudication: the lowest success rate for employees was when the respondent employer was represented by counsel.[26]

As the findings from the 1997 decisions indicated some variations of success rates, adjudicators were asked whether certain characteristics of parties affected their approach to the case, decision making process, and therefore the outcome. Most adjudicators advised that characteristics such as occupation, gender, and membership of Equal Employment Opportunity target groups did not affect their perception of the applicant or the claim. This was qualified by adjudicators indicating there were circumstances where those characteristics were relevant in terms of the capacity of the party concerned. So for example, adjudicators indicated they would influence the

[24] See Table 5.13.
[25] See Chapter 5.
[26] See Tables 5.19 and 5.20 and related text for discussion on representatives and success rates of employees.

atmosphere, intervene, aid unrepresented parties, and ensure that the power balance *at least in the hearing* is equal or balanced.[27]

8.1.4(B) REMEDIES AND COSTS

There was a large disparity between the monetary remedies that applicants sought and what was granted:[28]

- The national average of recovery of wages lost sought was $18,000; an average of $4,000 was granted.
- Compensation sought was $22,000; $3,300 was granted.
- Total remedies sought were $39,000; $6,000 was granted.

While the reasons for this disparity are related to the constraints on adjudicators, there are also small, not statistically significant differences in what was granted related to the occupation of the applicant,[29] representation,[30] which adjudicator was sitting, and the nature of the personal grievance itself. Adjudicators expanded on the above by indicating that a variety of additional contextual factors affected their exercise of discretion on overall remedies. This allowed them to take into account parties' individual circumstances.[31] However, the above figures show a significant gap between applicants' expectations and outcomes. In assessing quantum of remedies, adjudicators took into account additional factors, including court guidelines, previous awards levels, an applicant's contributory conduct and an employer's ability to pay.[32]

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[27] See Chapter 6.6.1
[28] These rounded averages are from Tables 5.21, 5.24, and 5.32. See also related text.
[29] See Table 5.26 and related text.
[30] See Table 5.28 and related text.
[31] See discussion at Chapter 6.4.12(c).
[32] For an extensive discussion on adjudicators' approaches to remedies, see Chapter 6.4.12.

Perceptions of adequate remedies granted impacted on parties' satisfaction levels with the personal adjudication process. For example, of the employees surveyed, 67 percent indicated they did not believe they received adequate compensation.[33] This was exacerbated by similar issues relating to costs.[34]

8.2 Analysis Of The Access To Justice Principle

Although the intention of the National Government at the time of passing the *Employment Contracts Act* in 1991, set out in the Objects section of the Act, was to make the adjudication system quick, informal and inexpensive, this has not been shown to be the reality for a significant proportion of those involved with adjudication. In Chapters Five, Six, and Seven, this thesis has examined issues related to time delays, cost and the necessity to use lawyers in a complicated system. Commentators and adjudicators have indicated that the detailed Regulations required a level of formality that encouraged greater use of legal representation and inevitably made the adjudication process more complex, and had limited the statutory ability for the Tribunal to set its own procedure.[35] Such constraints had the effect of increasing time delays and costs; which in turn affected access to justice for many people. These issues are discussed in detail below however, it should be noted that there is considerable overlap between some of these issues.

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[33] See Tables 7.15 and 7.16 for discussion on perceptions of remedies and outcomes.
[34] For the quantum and impact of costs, see Chapters 5.4.8, 6.8.3, and 7.5.8.
[35] See, for example, Neville Taylor, 'The Employment Tribunal – Is There a Better Way?' [1996] ELB 101, 102; 'Through no fault of the Tribunal, the procedures have, to varying degrees, become quite legalistic and formal. Such an approach is time-consuming, expensive, and less "user friendly" to the lay-person. Within the existing structure, there is probably no escape from such developments. The statute, despite pretensions to the contrary, requires a degree of intrinsic formality and legal procedure.' See also, John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 139.

The Employment Tribunal was established under the *Employment Contracts Act 1991* to hear and determine most employment related matters. The Employment Tribunal was the first step in the legal hierarchy of the employment jurisdiction. If either party was dissatisfied with the Tribunal's decision, appeal could have been made to the Employment Court on questions of law. The Employment Court also had first instance jurisdiction over some matters.[36] Further appeal, was then available to the Court of Appeal on points of law.[37] The Employment Tribunal was bound by the decisions and directions of the Employment Court and the Court of Appeal. Likewise, the Employment Court was required to follow decisions of the Court of Appeal.[38] In the words of Goddard CJ, it was clear that the *Employment Contracts Act 1991* 'continue[d] the hierarchical system established by the *Labour Relations Act 1987* under which each lower tier must accept loyally the decisions of the higher tiers on questions of law.'[39]

8.2.1 PROCESS ISSUES

8.2.1(A) LOW LEVEL

The then Minister of Labour, William Birch, in his second reading speech to Parliament on the Employment Contracts Bill in 1991, said that for the Tribunal 'the intention [was] to provide a specialist lower level institution which [would] be able to resolve many issues closer to the workplace.'[40] However, it has been argued that the

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[36] *Employment Contracts Act 1991*, s 104: examples included breach of contract, compliance, tort actions and injunctive relief.
[37] Ibid, s 135.
[38] See generally, Chapter 2. See *Employment Contracts Act 1991*, Part VI. Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para VI.1, Introduction.
[39] *New Zealand Public Service Association v Electricity Corporation of NZ Ltd, Marketing Division* [1991] 2 ERNZ 365, 380, Goddard CJ.
[40] Hon W F Birch, Minister of Labour, Second Reading Speech, Employment Contracts Bill (1991) 12.

Employment Contracts Act 1991 actually had the opposite effect as it focussed on individual rights and deregulated the representation market.[41] This resulted in the increased involvement of lawyers and a loss of influence on the part of the unions. Roth suggested that this represented:[42]

> …the reorientation of workplace conflict away from the industrial relations arena and towards the staking out and enforcement of individuals' legal rights in legal forums, so that litigation, or the threat of it, [became] the paradigmatic mode for dealing with problems in the workplace. This [was] both expensive and inefficient.

Lesser union involvement in dealing with workplace difficulties meant that the union 'filtering function'[43] apparent under the *Labour Relations Act 1987* disappeared.[44] The unions' ability to decline representation where they believed cases lacked substance was removed from the legislation and potentially all employment related problems became part of the waiting list for mediation or adjudication.[45] However, as mediation was not compulsory under the *Employment Contracts Act 1991* a significant number of cases went directly to adjudication. It is possible to speculate that the unions simply adapted to the new system in their own way. One union advocate, in response to this thesis survey, said:

> In all our cases we have what effectively is a mediation with the employer but without a formal mediator so we then always went direct to adjudication.

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[41] This argument was based on workplaces that were previously unionised. In the case of employees who had been outside the personal grievance coverage because they did not belong to a union, the changes did give them access to a lower level process, as they would previously have had to go to the District Court or the High Court. See below, para 8.1.4(b) for discussion on the effects of increased legal representation.

[42] Paul Roth, 'The Cost of "Individualising" Labour Law' [1997] ELB 82. Roth added that '[b]y individualising labour law the way it did, the Government committed itself to industrial relations by litigation'.

[43] Ibid

[44] *Labour Relations Act 1987*, sch 7, cl 4, 'Discussion between union and employer – Where the union considers that the personal grievance has substance, it shall forthwith take the matter up with the employer or a representative of the employer with a view to reaching a settlement of the grievance.'

[45] Roth argued that the taxpayer was then left to 'foot the bill' for mediation and adjudication of cases that might previously not have got through the union sieve. Paul Roth, 'The Cost of "Individualising" Labour Law' [1997] ELB 82.

Alastair Dumbleton, then Chief of the Employment Tribunal, observed in 1996 that the Employment Tribunal was aware that, at times, little if any effort had been made by the parties to resolve the matters in dispute before formally filing for adjudication.[46] Dumbleton suggested that rather than using a common sense approach to resolving the issues, the grievant was 'intent on waving the big stick of adjudication and the enforceable remedies available there'.[47] This was arguably contrary to the expectation under the *Employment Contracts Act 1991* that the employer would first be given the opportunity 'to remedy the grievance rapidly as near as possible to its point of origin.'[48] However, while Dumbleton referred to 'the grievant' in this context, it could equally have been the employer who chose to avoid mediation and seek for the matter to go directly to adjudication. The greater influence of lawyers may also have been a contributing factor to these decisions.[49] One union advocate, in response to this thesis survey commented:

> Although [under the new *Employment Relations Act 2000*] mediation seems to be very successful but I don't believe it always results in a just outcome. Also employees always seem to be satisfied, win or lose if they have their day in "Court". Although resolved, mediation seems to lack that "justice at last" feeling.

The procedures and rules contained in the *Employment Tribunal Regulations 1991* arguably made it difficult for the Tribunal to operate at a low level. The adjudication process was similar to that followed by the Employment Court and the District and High Courts.[50] The setting for Employment Tribunal hearings was formal (although

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[46] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' [1996] 21(1) NZJIR21, 32.
[47] Ibid.
[48] *Employment Contracts Act 1991*, sch 1, cl 3(1).
[49] See below, 8.2.1(b), for Margaret Robbie's comments on lawyers' attitudes to mediation and following discussion.
[50] Walter Grills, 'Dispute Resolution in the Employment Tribunal, Part Two: Adjudication' [1993] 18(1) *New Zealand Journal of Industrial Relations* 84. Grills was an Adjudicator and Mediator of the Employment Tribunal in Dunedin.

not as formal as the ordinary courts) with witnesses sitting at a separate table from representatives and parties and the adjudicator separate at the front. How you viewed the layout might have depended on what you were comparing it to. A number of adjudicators in this research said that it was less formal than the Employment Court but more formal than the conciliation process under the previous *Labour Relations Act 1987*.[51] One representative (counsel) summed it up this way:

> All of those adjectives [in the survey questionnaire] apply. Overall there is a pattern of formality, but without the stuffiness or pedantry of civil courts. There is legalism, and it is time consuming; not so much in the hearing, but in the preparation of briefs and submissions.
>
> These are not necessarily criticisms, the issue involved concerns legal rights and remedies. They should be addressed predictably and carefully, failing which there is often cause for dissatisfaction, not only in the result, but whether there has been a fair hearing. The most important person is the party who is going to lose.

The formal rules in the Regulations regarding swearing in of witnesses,[52] presentation of evidence,[53] examination of witnesses,[54] rebuttal evidence,[55] and closing statements,[56] together with the formal layout of the rooms and the use of lawyers all suggested to participants in the process that the low-level workplace conciliation procedure which had applied under the *Labour Relations Act 1987* had been replaced

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[51] See Chapter 6.4.1.

[52] *Employment Tribunal Regulations 1991*, reg 49(1); Procedure in adjudication proceedings:
(a) Every witness shall be examined on oath (which term includes an affirmation).

[53] Ibid, reg 49(1)(b) – (d):
(b) Each witness may give his or her evidence-in-chief by reading or confirming a written brief or statement of evidence:
(c) The Tribunal shall first hear the applicant and such evidence as the applicant may adduce:
(d) The Tribunal shall then hear the respondent and such evidence as the respondent may adduce.

[54] Ibid, reg 49(1) (f): The parties may examine, cross-examine, and re-examine witnesses.

[55] Ibid, reg 49(1)(e): If the Tribunal is satisfied that evidence adduced by the respondent included material that could not reasonably have been foreseen by the applicant, it may, if that material requires an answer, allow the applicant to adduce evidence in rebuttal.

[56] Ibid, reg 49(1)(g): Either party may, in an address to the Tribunal, sum up the party's case.

by a higher (more formal) level of operation. Goddard CJ appeared to anticipate this when he commented that:[57]

> …a systemic change is about to be made highlighting even more acutely a hierarchical system of dispute resolution.

a) Informal – accusations of legalism

One of the central objects of the *Employment Contracts Act 1991* was to create an informal system for resolving personal grievances. Concerns about formality and legalism had already existed prior to the *Labour Relations Act 1987*. The 1985 Parliamentary Green Paper on Industrial Relations had identified 'structural and operational problems, particularly delays in Court hearings and the alleged tendency for greater legalism and focus on technical detail'.[58] Despite this, the *Labour Relations Act 1987* gave the Labour Court exclusive jurisdiction to hear all legal matters arising from the legislation.[59] Ryan and Walsh argued that this[60]

> …continued and indeed accelerated the trend towards giving the Court a greater authority in relation to legal questions, by transferring to it jurisdiction which had until then been with the civil courts, and increasing its status by making it inferior only to the Court of Appeal... Thus the changes made by the *Labour Relations Act* gave rise to a considerably more formal and legally based system than in the past.

Under the *Labour Relations Act 1987*, the Grievance Committee process was initiated by a union. With the extension of access to personal grievances by non-union

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[57] *New Zealand Public Service Association v Electricity Corporation of NZ Ltd, Marketing Division* [1991] 2 ERNZ 365, 381, Goddard CJ.

[58] Minister of Labour, *Industrial Relations: A Framework for Review*, New Zealand Government (1985). See Rose Ryan and Pat Walsh, 'Common Law v Labour Law: the New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 233. See Chapter 3.3.3(b) for Goddard CJ's comments in *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756.

[59] *Labour Relations Act 1987*, s 279, Jurisdiction of Labour Court. See Rose Ryan and Pat Walsh, 'Common Law v Labour Law: the New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 233.

[60] Rose Ryan and Pat Walsh, 'Common Law v Labour Law: the New Zealand Debate' (1993) *Australian Journal of Labour Law* 230, 234.

employees under the *Employment Contracts Act 1991* the Government's aim in introducing the Employment Tribunal to adjudicate employment problems was ostensibly to create a low-level, informal process for all employees. While mediation remained an option, the adjudication process was however, similar in many respects to an ordinary low level court system[61] and it utilised an adversarial approach rather than a conciliatory one, as had been the case under the *Labour Relations Act 1987* at an equivalent level,[62] or an investigative model as is now the case with the Employment Relations Authority under the *Employment Relations Act 2000*.[63]

Dumbleton acknowledged that the adjudication process was adversarial in nature.[64] He believed that the mediation process met with the intentions of the Act,[65] but that the adjudication system was by its nature formal as parties were examined and cross-examined in a manner at odds with the expected informality.[66] However, Dumbleton defended the manner in which Employment Tribunal hearings were conducted and believed that accusations of excessive legalism should have been directed towards

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[61] Margaret Robbie, *Representation, Procedure and Process in Mediation and Adjudication Since the Employment Contracts Act*, Research Paper, Waikato Polytechnic (1993) iii. 'The procedures and rules of the Tribunal give it the jurisdiction of a lower court. It can hear penalty actions, arrears claims and order compliance, functions the mediation service in the arbitration role had no jurisdiction over.'

[62] *Labour Relations Act 1987*, sch 7, cl 7; Grievance committee. Where a union was not satisfied with an employer's response to a personal grievance claim, they could call for a grievance committee to be established by the Mediation Service. The committee comprised an equal number of representatives of the union and the employer. See Chapter 2.2.2.

[63] *Employment Relations Act 2000*, s 157, 'Role of Authority – (1) The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.'

[64] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' [1996] 21 NZJIR 21, 23.

[65] See also, Paul Stapp, *The Employment Tribunal in 1998*, Paper to the New Zealand Law Society Employment Law Conference 1998, 137. 'The tribunal's role in mediation has I believe been successful, particularly if viewed in terms of outcomes and bearing in mind the tribunal's total work load.'

[66] Ibid 34 [1996] 21 NZJIR 21, 23. 'Courtroom litigation is by its very nature, not a people friendly process. Even in the Tribunal, where the character of adjudication is required to be low level and informal, the necessary questioning and cross-questioning of men and women about relevant (and sometimes irrelevant) aspects of their personal lives, and the wear and tear generally of having to be an adversary, have a tendency to buckle the spirit of people. I am sure that many people have been left rueful of the whole adjudication experience even when they have won the battle.'

how the law was communicated and explained to parties. In his opinion, case law had 'expand[ed] upon and qualif[ied] concepts' that appeared simple in the Act. Further, the influence of the Court of Appeal on employment law meant that rights could no longer be determined simply by reading and interpreting the *Employment Contracts Act 1991*.[67]

Many Employment Tribunal adjudicators agreed with Dumbleton's perceptions that it was the influence of the Employment Court and the frequent use of lawyers that created a formal atmosphere and increased the degree of legal knowledge required in the Employment Tribunal.[68] In Chapter Six, adjudicators' comments displayed a strong opinion that the influence of the Employment Court had made the Employment Tribunal more formal than it should have been. The objective of the system was seen as having been defeated by 'overly legalistic supervisory judgments from the Court', creating an 'overly academic approach to employment law' which affected public perception of the Tribunal.[69] Three-quarters of the adjudicators interviewed for this thesis did not believe that the intentions of the *Employment Contracts Act 1991* in this area had been met. They felt that the Employment Court 'was to blame because it set standards too high and moulded the Tribunal in its own image'.[70] Some commented

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[67] Ibid [1996] 21 NZJIR 21, 30. '[The Court of Appeal's] decisions, many of which are at variance with those of the Employment Court, add further to the legal tracts that have supplanted the statute as the primary and public source of employment law… I do not know how even practitioners who specialise in employment law manage to keep up, let alone the ordinary consumers for whose benefit (fictionally it may seem) statutes such as the ECA are supposed to be written and enacted.'

[68] See below, 8.2.1(b) for discussion of the influence of the Employment Court on the Employment Tribunal.

[69] See Chapter 6.4.1.

[70] See below, 8.2.1(b) for discussion of the influence of the Employment Court on the operations of the Employment Tribunal.

that it had became dominated by the legal profession, who were able to manipulate the procedures to 'raise fees for law firms', slowing the process down.[71]

However, commentators have suggested that the way that the adjudication process was created by statute and regulation made it inevitable that there would be a significant level of formality and legalism.[72] The 'statutory design of the adjudication role [meant that] the Employment Tribunal [could not] effectively deliver the degree of informality that [was] desirable.'[73] Rather than the presence of lawyers in the Employment Tribunal being the cause of increased legalism, it was argued that the 'cause and effect' were in fact reversed and that:[74]

> The extent of the jurisdiction of the Employment Tribunal, the nature of the remedies that [could] be awarded, and the inability to raise on appeal matters that could have and should have been raised in the Employment Tribunal [meant that] at least in its adjudication role it [was] unrealistic to expect that Employment Tribunal proceedings [could] be any more speedy informal or low level than they [were].

The jurisdiction of the Employment Tribunal and the potential to award powerful remedies, including reinstatement where practicable, meant that in practice the Employment Tribunal could not logically be thought of as informal and low level.[75]

Ralph Gardiner, an Employment Tribunal Member at the time, argued that the greater formality of the adjudication hearings should not have been cause for alarm as there

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[71] See Chapter 6.4.1. See below, 8.2.2 on delay and 8.2.3 on costs.
[72] John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 139. See also, Neville Taylor, 'The Employment Tribunal – Is There a Better Way?' [1996] ELB 101, 102. See Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para VI.1.
[73] Neville Taylor, 'The Employment Tribunal – Is There a Better Way?' [1996] ELB 101, 102.
[74] See Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para VI.1.
[75] *Employment Contracts Act 1991*, ss 40 and 42. These included reimbursement of wages lost, reinstatement to the employee's former position, and compensation. See Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para VI.1. The statute did not put monetary limits on awards that the Employment Tribunal made. See Chapter 5.4.7, for discussion of remedies sought and granted by the Employment Tribunal.

always had to be a body 'where matters were heard more formally'.[76] He said 'that Tribunal adjudication hearings [were] more formal than was a *Labour Relations Act* Grievance Committee' but that as the adjudication function had previously been carried out by the Labour Court, the formality should not be a surprise.[77] However, this view did not take into account that mediation (in the Grievance Committee) was compulsory under the *Labour Relations Act 1987* and that the Labour Court was the next, formal step if that failed. In contrast, adjudication under the *Employment Contracts Act 1991*, with its accompanying formal process, was frequently the first stage in attempting to resolve employment issues.

The perception of the Employment Tribunal as formal and legalistic may have been an important factor in determining access to justice matters. This was reinforced by the comments of participants recorded in Chapter Seven of this thesis. In general, respondent parties (usually employers) found the adjudication system less formal and intimidating than applicant parties (usually employees).[78] The differing perceptions of applicants and respondents arguably reinforced the power imbalance between the parties and may have been explained by greater confidence from employers around the use of the system and their ability to retain, and pay for, suitable representation.[79] The views of thesis survey participants reflected the general perception that employment issues were being dealt with further away from the workplace than had been the legislators' expressed intention. However, this arguably accorded with the

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[76] W R C Gardiner, *The Employment Tribunal (A Report from the Trenches)* (1998) 7. See discussion of restricted appeals and other technical barriers later in this section.
[77] Ibid. 'Wherever you locate that function (at the Tribunal, back at the Employment Court or over at the District/High Court) there is always going to be a place where these matters are heard more formally, where the evidence is given on oath and where the evidence is tested by examination and cross-examination.'
[78] See Chapter 7.5.2 where possible reasons for this difference are discussed.
[79] See Chapter 6.6.1 for adjudicators' views on the issue of power imbalance.

more ‘pure contractual’ model on which the *Employment Contracts Act 1991* was originally based.[80]

The deregulation of the representation market in the employment law arena made it possible for parties to represent themselves or more commonly, to be represented by lawyers.[81] Gardiner argued that this (along with the widening of the availability of grievance procedures to all employees) ‘profoundly changed the face’ of representation in the ‘basement employment institution (previously the Mediation Service, now the Employment Tribunal)’.[82] Previously, employees were usually represented by the union and the employers by an Employers’ Association advocate, a lawyer, or themselves. Gardiner saw it as inevitable that those whose non-union status had previously denied them access to personal grievance procedures would not approach a union for representation but would seek independent representation.[83]

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[80] *Employment Contracts Act 1991*, Long Title – ‘An Act to promote an efficient labour market…’ See also, Rose Ryan and Pat Walsh, ‘Common Law v Labour Law: the New Zealand Debate’ (1993) *Australian Journal of Labour Law* 230, 240-241 for a discussion on the contract law approach to the employment relationship. Those who subscribe to this approach see the employment relationship as being no different from any other commercial contractual relationship and that employer and employee are free to contract under whatever terms they agree to. Ryan and Walsh, however, argue that this idea ‘assumes a degree of equality [in bargaining] which rarely exists’ and that ‘individuals faced with the Hobson’s choice of a poor employment contract or not working at all may in fact be in a position akin to economic duress.’ The *Employment Contracts Act 1991* did, however, recognise the special nature of the employment relationship by retaining the specialist institutions.

[81] Paul Roth, ‘The Cost of “Individualising” Labour Law’ [1997] ELB 82. ‘Deregulation of the employee representation market also meant that many more lawyers became involved in dealing with industrial matters, which has undoubtedly contributed to the increased legalism (and consequent delays) in the employment institutions.’ See Chapter 5.4.2, Table 5.10, for information regarding the numbers of parties who represented themselves or who had legal representation.

[82] W R C Gardiner, *The Employment Tribunal (A Report from the Trenches)* (1998) 5. See also, Margaret Robbie, *Representation, Procedure and Process in Mediation and Adjudication Since the Employment Contracts Act*, Research Paper, Waikato Polytechnic (1993) IV. ‘Lawyers and to some extent “consultants” have greatly benefited [sic] from the ECA. Although there is a perception that this is at the expense of union officials, it is probably largely due to the widened access of personal grievance procedures to traditionally non-unionised employees, and also the employer as an enterprise bargaining unit utilising other agents for contract negotiations, and thus disputes and grievances which arise out of them.’

[83] Ibid.

The increase in representation by legal counsel was confirmed in research, conducted by Margaret Robbie, of all Employment Court and Tribunal decisions between July 1990 and the end of July 1992. In less than a year after the introduction of the *Employment Contracts Act 1991* she found that there was a complete reversal of the proportions of representation by counsel and advocates and that counsel then substantially outnumbered advocates. Unlike the research in this thesis, Margaret Robbie's research focussed on both personal grievances and disputes and looked at two years of comparison as opposed to one.[84] However, research undertaken for this thesis also indicated that under the *Employment Contracts Act 1991* in 1997, in personal grievance claims at adjudication, counsel significantly outnumbered advocate representatives for both respondents though less so for applicants.[85] It is impossible to compare these figures with representation in the Grievance Committees under the *Labour Relations Act 1987* as data on representation was not kept, but anecdotally representation by counsel in those committees was rare.

Despite differing years and types of claims measured, the findings of the two studies appear consistent. The increase in the number of lawyers appearing in the Tribunal and corresponding decrease in the involvement of union advocates and organisers was also confirmed in research by JP Thomson in 1992[86] and supported by the following responses to questions in the thesis surveys:

> The Tribunal came to be dominated by the legal profession. (Adjudicator)

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[84] Margaret Robbie, *Representation, Procedure and Process in Mediation and Adjudication Since the Employment Contracts Act*, Research Paper, Waikato Polytechnic (1993).
[85] See Chapter 5.4.2 and Table 5.10.
[86] See Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55, 56, citing JP Thomson, 'Personal Grievance Outcomes – Have There been Any Changes?' [1992] ELB 29.

> [A suitable alternative to the system under the *Employment Contracts Act 1991*:] Keep lawyers out of the system as it was prior to '91. (Representative)

Gardiner believed that it was inevitable that the greater use of lawyers would have an effect on the level of formality and the amount of legal argument used:[87]

> Allowing that adjudication is a more formal process than is mediation, representatives can do much to contribute to, or (perversely) to derogate from, the ability of the Tribunal to deliver on one of its section 76 objects which is that it is to be "a low level, informal Tribunal."

Robbie's research confirmed this view. She said that the greater involvement of legal counsel was one direct result of the change from the informal procedure under the *Labour Relations Act 1987* institutions to the more formal structure under the *Employment Contracts Act 1991*.[88] She also argued that lawyers were less likely to be trained in or experienced in mediation and were therefore much more likely to prefer adjudication as a method of resolution, she suggests:[89]

> Lawyers, by dint of their training, are more litigious, prefer to operate in a formal court environment as opposed to a mediation setting, and thus demonstrate little ability or willingness to settle matters through dialogue.

Robbie found inexperience of mediation was especially apparent for those lawyers who were new to the employment law area. She found that the 'overriding impression' was that many cases that could have been settled in mediation had not been referred to mediation because of a lack of understanding of the law or 'because of the skills (or lack of skills) of the representatives and their attitude to mediation.'[90] One advocate surveyed for this thesis, who was representing a respondent, commented on the inappropriate use of mediation in the following terms:

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[87] W R C Gardiner, *The Employment Tribunal: A Report from the Trenches*, (1998) 7.
[88] Margaret Robbie, *Representation, Procedure and Process in Mediation and Adjudication Since the Employment Contracts Act*, Research Paper, Waikato Polytechnic (1993) IV.
[89] Ibid v.
[90] Ibid vii.

> The fact was that at the end of it [adjudication] it was clear that the applicant had a much fuller understanding of where he stood than he did at the outset. In fact, I'd say there was less acrimony between the parties by the end than there had been beforehand. Yes, maybe that should have been achieved at mediation with a skilled mediator, but mediation is too often approached as a "fact finding" exercise to draw out the other side (for use at future adjudication) rather than a genuine attempt to settle, and in my experience most of the mediators were pretty bloody useless.

However, Robbie's conclusions differ from those of this thesis. By 1997 it was clear that this had changed, as virtually all counsel who responded to the survey responded had experience in mediation.[91] Further, a high number of personal grievance cases were settled in mediation during 1997.[92] However, these figures did not give any insight on the quality of the mediation, the attitude of representatives in that forum or the fairness and equity of the outcomes reached. They do, however, highlight the change in the manner of representation at that low level, which Gardiner identified.

The tendency of lawyers to try to transfer court etiquette and rules into the Employment Tribunal was remarked on by Goddard CJ in 1993 in *Davidson v Telecom*[93] in the context of the presentation of evidence. He was surprised by the representatives' unduly legalistic approach to points of evidence and reaffirmed the informal nature of the Employment Tribunal and its ability to admit evidence, whether or not it was strictly legal, in equity and good conscience. His comments seem not to have had the desired effect, as he made similar comments in 1996, in *Reid v NZ Fire Service Commission.*[94] Similar concerns regarding an overly legalistic

[91] See Chapter 7.4.4 and Table 7.9 for representatives' experience in mediation.
[92] See Chapter 2.3.2, where it was stated that mediation was successful in over 70 percent of cases.
[93] *Davidson v Telecom Central* [1993] 2 ERNZ 819.
[94] *Reid v NZ Fire Service Commission* unreported, Employment Court, Wellington, Goddard CJ, WEC 28/96, 16 May 1996.

approach to the adjudication process were reflected in some applicants' responses to this thesis survey. They suggested:[95]

> Legal points ruled and grass roots fact never got heard or presented.

> If you wanted a Hollywood drama or lawyers dodging issues and saving costs [for the respondent] and trying to kick a person's self esteem out the door then yes [the process was straightforward] but for resolving issues then, no.

Arguments about the use of lawyers in adjudication have become somewhat circular. According to some commentators[96] the use of lawyers in any process tends to increase the formality and legalism of that procedure, which reinforces a perception that it is necessary for parties to use lawyers to help them understand and access the system. It is argued that in the employment context this perception meant that adjudication appeared more inaccessible and self-representation became less of a realistic prospect. For many, access to good quality legal advice in the first instance was essential to access the procedure. The steps outlined in public information brochures on how to use the adjudication process were arguably complex.[97] Further, legal counsel was seen as necessary to ensure that relevant arguments and settlement proposals were put forward in the best possible light.[98] As one counsel stated in response to this thesis survey, the adjudication process was straightforward from the position of a 'legal' user but 'not straight forward for someone [employer or employee] representing themselves.' Other counsel said:

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[95] See Chapter 7.5.4. One third of applicants found the process legalistic.
[96] See, for example, B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282.
[97] For example, see Appendix II.
[98] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 284. Harris was speaking about access to the courts generally, but this is clearly directly applicable to this thesis. See Chapter 6.4.5 for adjudicators' comments on self-representation. See also Chapter 7.6.5.

> The process and procedure is straightforward once it is known, and it should be known by representatives of the parties. Predictable procedure is to be preferred.
>
> It followed a normal adversarial procedure with which I am familiar.

It is submitted that for the average employee or employer who has never used the procedure before and probably would hope never to have to use it again, the fact that representatives may have found it more straightforward than they did reinforced the need to use representation and that was not necessarily a positive factor in ensuring access to justice.

Under these circumstances the procedures contained in the Regulations and the practice of how the Employment Tribunal worked arguably created a dependency on lawyers that was contrary to the legislative intent of the *Employment Contracts Act 1991*. However, this dependency, and its alleged effect on access to justice issues, was not unusual in the law generally. In 1986, the Department of Justice research on Legal Services observed that:[99]

> The failings attributed to lawyers… will only be resolved by major changes within the legal profession itself, and in the processes which create dependency on lawyers. Criticisms… include pre-occupation with profit, reputation and status; lack of commitment to justice; inability to relate to human realities of other classes and cultures; ignorance and disinterest in cases which are unattractive and financially unrewarding… elitist and patronising attitudes to women, Maori, Pacific people and non-professionals generally; gross cultural insensitivity and arrogance; basic failure to communicate; use of technical legal jargon which excludes lay clients from understanding and taking control; plush offices which make commercial clients comfortable, and ordinary people uncomfortable; restricted opening hours causing serious inconvenience to workers and rural dwellers; unavailability in emergencies; and lack of child care facilities and flexibility to meet women's needs.

Transposing these views to the employment setting, it can be seen that the approach taken by lawyers pushed the resolution of employment problems further away from

[99] Department of Justice, *Te Whainga I Te Tika; In Search of Justice*, Report of the Advisory Committee on Legal Services (1986) 37.

the workplace and made it more likely that they would be resolved in a formal setting. For some parties the manner in which lawyers operated would have appeared 'alien and alienating' and would therefore have acted as a barrier to accessing the system. Some applicants in this thesis (50% of whom said in the survey they found the process intimidating) provided the following observations about the procedure:

> [The process] was very formal.
>
> During the hearing my employer's lawyer lied about a crucial aspect and I was not allowed to respond.
>
> The explanation [from the lawyer] was confusing.

Close to one quarter of representatives said parties were not aware of their legal obligations. One representative surveyed commented that the hearing:

> …took six days when originally set down for two – increased time mainly down to adjudicator questions and other counsel's rambling cross-examination which wasn't checked by the adjudicator. (Counsel)

However, representation can have a positive effect on access to justice for some. As one counsel for an applicant said:

> [The process] took all day because the respondent was vocal, unrepresented and therefore uncontrolled.

Any inclination which lawyers may have had to complicate and protract employment litigation was assisted by the technical nature of the *Employment Contracts Act 1991*. Technical barriers such as the 90-day rule,[100] jurisdictional issues between the

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[100] *Employment Contracts Act 1991*, s 33; Right to use procedures –

> (2) Every employee who wishes to submit a personal grievance to that employee's employer in accordance with the applicable personal grievance procedure shall, subject to subsections (3) and (4) of this section, submit the grievance to that employee's employer within the period of 90 days beginning with the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee, whichever is the later, unless the

Employment Tribunal and the Employment Court,[101] and restricted appeals[102] increased rather than decreased formality and led to more, and more complex legal argument. Universal access to personal grievances also increased both the number of claims and their complexity.[103]

Unless a party could show that they could not reasonably have placed relevant issues before the Employment Tribunal at first instance,[104] the Court could consider 'only those issues, explanations and facts that were placed before the Tribunal.'[105] Paul Roth observed that 'the limits on introducing new arguments and evidence on appeal [rendered] the Tribunal a less informal and speedy forum because ideally all conceivable legal arguments need[ed] to be presented and canvassed at first instance "just in case"'.[106] This was borne out by one adjudicator's response in this thesis who indicated:

> I would say on a percentage basis more than 50 percent, no it would be higher than that, called either irrelevant witnesses or insufficient witnesses. But more irrelevant witnesses, and why was that? Because if they didn't get it all on record at that point, they couldn't introduce new witnesses at the next step, they'd have to seek leave of the court. So they brought in

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> employer consents to the personal grievance being submitted after the expiration of that period.
> (3) Where the employee's employer does not consent… the employee may apply to the Tribunal for leave to submit the personal grievance after the expiration of that period.
> (4) Where, on an application under subsection (3) of this section, the Tribunal, after giving the employee's employer an opportunity to be heard,–
> (a) Is satisfied the delay in submitting the personal grievance was occasioned by exceptional circumstances; and
> (b) Considers it just to do so, – the Tribunal may grant leave accordingly, subject to such conditions (if any) as it thinks fit.

See also Chapter 2.4.1(c).

[101] Ibid, s 94; Removal of proceedings to Court. Any party to the proceedings could apply to the Tribunal to have the case heard at first instance in the Court, in limited circumstances.

[102] Ibid, s 95; Appeals.

[103] John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 139.

[104] *Employment Contracts Act 1991*, s 95(4)(b).

[105] Ibid, s 95(4)(a). This was a significant change from the previous legislation where appeals were heard *de novo*. The *Employment Relations Act 2000* has returned to the principle of *de novo* appeals from the Employment Relations Authority. See *Employment Relations Act 2000*, s 179(3).

[106] Paul Roth, 'The Cost of "Individualising" Labour Law' [1997] ELB 82. See also, John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 139.

> everything but the kitchen sink, and as a result, managed to lengthen the hearing, the cost of it, and everything else. It was a fault of the process.

One representative (an advocate) surveyed commented: '…it ran on for days-irrelevant and unnecessary evidence introduced by the applicant…' Average hearing length was 1.6 days, with 14% taking over two days in 1997.

The 90-day rule also acted as a constraint on access to justice by requiring the applicant to have advised the employer within 90 days that a personal grievance was alleged.[107] It is suggested that whilst it was arguably appropriate to require the applicant to inform the employer promptly of a potential personal grievance it may have caused difficulties where employees were suffering stress and humiliation. If the applicant missed the 90-day deadline it was necessary for an application to be made to the Employment Court seeking leave for the claim to be heard out of time.[108] This in itself added another complex tier to the personal grievance process and there was a high threshold required to prove that exceptional circumstances existed sufficient to allow the late application.[109] Roth noted that 'between 1992 and March 1997 there were 110 Tribunal cases and 10 appeals to the Court relating to applications to submit personal grievances outside the time limit.'[110]

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[107] *Employment Contracts Act 1991*, s 33(2) and sch 1, cl 3. For technical details regarding the 90-day rule, see Chapter 2.4.1.3.
[108] Ibid, s 33(4). See Chapter 2.4.1.(c), for discussion of the 90-day rule and exceptional circumstances.
[109] *GFW Agri-Products Ltd v Gibson* [1995] 1 ERNZ 323 (CA) Gault J (obiter) 'It is sufficient to comment that the Legislature has provided for a time limit. That is a requirement of the law which is to be given effect and which cannot be abrogated by invoking equity and good conscience. Similarly, for the grant of leave an applicant must show exceptional circumstances having a causative effect upon the delay in submitting the grievance. The Legislature has set the burden at the high level by requiring that circumstances be exceptional and that must be given proper application. But see *Employment Relations Act 2000*, ss 114(4) and 115(a). This Act was drafted to overcome cases such as *GFW Agri-Products v Gibson* [1995] 1 ERNZ 323 by allowing exceptional circumstances to include the situation where 'the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1).'
[110] Paul Roth, 'The Cost of "Individualising" Labour Law' [1997] ELB 82, n 4.

Another difficulty for parties was the potential overlap of function between the Employment Tribunal and the Employment Court. This 'sometimes awkward split'[111] in jurisdiction resulted in increased numbers of interlocutory hearings and legal arguments which resulted in delays in proceedings.

8.2.1(B) A SPECIALIST COURT?

Commentators and adjudicators agreed that the Employment Court had a significant influence on the adjudication process and the role of adjudicators in the Employment Tribunal.[112] This was seen to have an effect on the issues surrounding cost, delay and process identified in this thesis and therefore impacted upon access to justice for all participants in the Employment Tribunal process. Under s 76(d) of the *Employment Contracts Act 1991* one of the objects of the Employment Court was to establish a specialist court to:

> …oversee the role of the Employment Tribunal and to deal with particular legal issues, it being recognised that the nature of employment contracts is such that the parties to employment contracts from time to time require the assistance and certainty that can be provided by a specialist court.

The Employment Court had jurisdiction under s 104 of the *Employment Contracts Act 1991*, among other things, to hear and determine appeals from adjudications of the Employment Tribunal and questions of law referred to it by the Tribunal.[113] In discussing the 'systemic change' that was about to occur under the *Employment Contracts Act 1991*, Goddard CJ said that the appeal structure ensured 'not only correctness but uniformity and it [was] obviously essential that the low level tribunal

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[111] Ibid.
[112] See for example Chapter 6.4.12(e) for adjudicator's opinions on following the Court's directions in the context of contributory fault.
[113] *Employment Contracts Act 1991*, s 104(a) & (c).

should accept without question decisions on questions of law made at each higher level.'[114] In *Benge v Attorney-General,* Goddard CJ said that in enacting s 76(d) Parliament had 'made it plain that it expect[ed] the Court to be an influence for certainty and stability'.[115]

The Employment Tribunal was not expected to develop its own line of authority.[116] In *McClutchie v Landcorp Farming*, Judge Finnigan said that Employment Tribunal decisions were:[117]

> …not without their persuasive relevance but they should not be offered to the Court as persuasive authorities. It is for the Employment Tribunal to function as "[a] low level, Informal, specialist…Tribunal..." resolving differences between parties to employment contracts and it is for the Court "to oversee the role of the… Tribunal and to deal with particular legal issues"… It is not for the Employment Tribunal to develop employment law or to lay down new lines of authority. Rather, it is for the Tribunal to accept and apply principles laid down from time to time by the Court when assistance and certainty are required. This juxtaposition of the institutions is one of the declared objects of the Act, at s 76.

Soon after Judge Finnegan further clarified the matter in *Winstone Wallboards v Samate*,[118] indicating that it was appropriate for parties before the Court to cite Tribunal decisions.[119]

> This is necessary so that the Court will be aware of the practice of the Employment Tribunal if one has been or is being developed, and of any principles or guidelines by which the tribunal is steering its course. For that reason those decisions have what I call persuasive relevance, particularly if the Court upholds them. They may or may not be upheld however and they should not be cited to the Court as persuasive authorities.

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[114] *New Zealand Public Service Association v Electricity Corporation of NZ Ltd, Marketing Division* [1991] 2 ERNZ 365, 380, Goddard CJ.
[115] *Benge v Attorney-General* [1996] 1 ERNZ 384, 397, Goddard CJ. See Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para 76.6.
[116] *McClutchie v Landcorp Farming* [1993] 1 ERNZ 388, 394, Judge Finnigan. See Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para 76.5.
[117] Ibid [1993] 1 ERNZ 388, 394, Judge Finnigan.
[118] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 510, Judge Finnigan.
[119] Ibid.

a) Precedent and Process

The authority of the Employment Court to make law and lay down principles and precedents was not really at issue; however, it affected access to justice in two ways. Firstly, the Employment Court directed the Employment Tribunal in the exercise of their functions.[120] In this area, the Court was interpreting rules that were already tightly prescribed in the *Regulations*.[121] The case law demonstrated that the Employment Court on occasion, criticised the operation of the Employment Tribunal and instructed it to adhere to the technical requirements in the Regulations, for example, regarding cross-examination.[122] This arguably restricted the Tribunal's discretion to adapt their procedure and therefore their ability to maintain a low-level process accessible and comprehensible to all.

Secondly, the Employment Court's interpretation of wider principles of employment law, such as the definition of 'unjustifiable' dismissal, led to arguments that there was a lack of certainty as to how the law had been interpreted and applied by the Court that further restricted the ability of all parties to ascertain and comprehend their rights under the Act.[123] This led to more complex arguments and submissions by parties, which in turn led to delays and added to the perceived need for representation. It is submitted that this also worked against the ideal of a low-level process.

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[120] *Employment Contracts Act 1991*, s 76(d).
[121] *Employment Tribunal Regulations 1991*, reg 49.
[122] See Goddard CJ's prescriptive procedural requirements in *Davidson v Telecom Central Ltd* [1983] 2 ERNZ 819 and his views on adjudicators engaging in cross-examination.
[123] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR 21, 30. 'People are deemed to know the law, but they can no longer rely on being able to confirm their rights and obligations by a reading of the *Employment Contracts Act*.'

Adjudicators surveyed for this thesis made a considerable number of comments about the Court both in terms of its law-making function and the ability of Tribunal Members to interpret and apply the principles established by the Court (See Chapter 6.4.11 and 6.4.12). There was further concern expressed by some adjudicators over the Court's interference in the Tribunal's processes such as:

> The Court imposed excessive rules so informality suffered.
>
> Some of the operation matters became too formalised. The Court administered the Tribunal by way of review and not appeal. The Court created legal complexity that surrounded the process. Procedures on filing were too legalistic, there were mechanisms for raising fees for law firms and it became too slow which was a resourcing issue.
>
> The statutory objectives were defeated by the Employment Court… There was nothing wrong with the system as it was designed. The Tribunal could have taken a more interventionist role like the Employment Relations Authority if it were not overly legalistic with supervisory judgments from the Court.
>
> The Tribunal would have worked better if not tied up by Employment Court rules, regulations and procedures.
>
> The Court made the Tribunal too legalistic and Tribunal adjudicators did not resist enough.

Dumbleton however, argued that the provisions in the *Employment Tribunal Regulations 1991* setting out the adjudication procedure were not excessively complex or legalistic and that 'the overriding consideration [was] fairness to both parties.'[124] However, the adjudicators' comments show that although this may have been so in principle, in practice the Employment Court tended to dictate operational instructions to the Employment Tribunal rather than allowing it to apply its discretion under the *Employment Tribunal Regulations 1991*.

[124] Ibid. See *Employment Tribunal Regulations 1991*, regs 2 and 49(2) and *Employment Contracts Act 1991*, s 88(3) 'In any adjudication proceedings, the Tribunal shall act fairly.'

In a number of cases the Employment Court severely criticised how the Employment Tribunal operated. This approach therefore constrained the Employment Tribunal's ability to adapt their procedures as the legislation allowed. In *McHale v Open Polytechnic*[125] Goddard CJ strongly criticised the process used by the Employment Tribunal and said that the order for trial set down in the regulations '[was] usually to be followed and commented that:[126]

> I think that I should express the Court's disquiet, falling only a little short of total disapproval of the form of proceeding adopted in this case for a number of reasons… While the Tribunal has, under the *Employment Contracts Act 1991*, a wide discretion as to the conduct of proceedings before it, that discretion is expressly made subject to the Act and to regulations made under the Act. The Act requires the procedure to be fair. The regulations set down an order for trial that is usually to be followed.
>
> Now it is true that by reg 49(2) the Employment Tribunal is empowered to intervene at any stage, but that provision was inserted to allay fears of a construction leading to an undesirably rigid or over-literal application of the order of hearing and to enable the adjudicator to ask questions of witnesses as and when some obscurity occurs to him or her rather than having to save it up to the end. It was not intended to allow, nor can the regulation be construed as allowing, the normal order of trial to be turned upside down except in the most rare and unusual of cases.

The perceived interference of the Employment Court was seen by one adjudicator in this thesis as restricting their ability to intervene and assist self-represented parties. This may have impacted on the ability of self-represented parties to effectively access justice, the adjudicator suggested:

> [T]he Court's directions are quite clear that as adjudicators we're supposed to be hands off. It's for the parties to conduct their own case and how they are going to present it. If on the other hand I'm conscious that important issues need to be brought out then rather than ask them to ask it, I will ask those questions myself…but again, I was conscious as a Tribunal Member of the restrictions on the degree of intervention that the adjudicator has.

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[125] *McHale v The Open Polytechnic of New Zealand* [1993] 1 ERNZ 186.
[126] Ibid. See also Anderson et al (eds) *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para 88.5; Duty to act fairly.

This perception was reinforced by decisions such as *Davidson v Telecom Central* [127] where Goddard CJ utilised the requirement of the statutory duty to be 'fair' as a reason to comment on the boundaries for the Tribunal when questioning witnesses. In his judgment he talked of preserving judicial 'detachment'[128] and approved a 'code of judicial conduct' set out by Lord Denning in the English Court of Appeal which suggests that:[129]

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

This 'guidance' was offered despite there being no complaint about the amount of questioning by either party in the *Davidson* case.[130] Goddard CJ indicated that it was not his intention to criticise the Tribunal but said that some Employment Tribunal members needed guidance in this area.[131] He then proceeded to give extensive direction to the Tribunal on the circumstances under which the Tribunal should ask questions, indicating:[132]

> Putting questions intended to satisfy the adjudicator's curiosity about the credibility or reliability of observation of a witness is in a different category… Questioning going to credibility is for the cross-examiner rather than the adjudicator and, if the former does not challenge credibility, there is no need for the Employment Tribunal to doubt it.

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[127] *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819. See *Mazengarb's Employment Law*, Looseleaf, (1991-1998) Vol 1, para 88.5, duty to act fairly.
[128] Ibid, Goddard CJ.
[129] *Jones v National Coal Board* [1957] 2 All ER 155, 159, Lord Denning. Cited in *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819, 837.
[130] *Davidson v Telecom Central Ltd* [1993] 2 ERNZ 819, 835
[131] Ibid.
[132] Ibid, 2 ERNZ 819, 837.

> It is, of course, illogical to criticise any action that leads to the truth being discovered nor would I wish to do so, but I sound the caution that a stage can be reached at which witnesses become rattled, or browbeaten.

Goddard CJ further indicated that his comments were 'intended to be a guide only and not to be taken as an exhaustive prescription of the Tribunal's duties', however, he then went on to canvass other procedural matters, stating that 'relevance, privilege from disclosure, and fairness are the only rules of admissibility and exclusion that the Tribunal needs to feel called on to recognise.'[133]

Despite the provision in the *Employment Contracts Act 1991* that the Employment Tribunal should act in a low-level, informal manner, constant reminders and directions from the Employment Court as to the operation of the Employment Tribunal meant that adjudicators were unlikely to stray far from the process set down in the Act and the directions of the Employment Court. This perception was reinforced by Paul Stapp, a Member of the Employment Tribunal at the time, who said that comments from the Employment Court assisted the Tribunal to discipline the parties and avoid excessive legalism during the adjudication process, however, 'the clear message prevent[ed] the tribunal from intervening too much in the process itself.'[134]

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[133] Ibid 838.

[134] Paul Stapp, *The Employment Tribunal in 1998*, Paper to the New Zealand Law Society Employment Law Conference 1998. 'Indeed, the tribunal might well be hesitant in drawing the parties back to relevancy on the issues in a hearing where the parties have the right to approach their cases in the way they feel fit, and for the parties to put all the evidence before the tribunal to cover themselves for an appeal.'

It is interesting to note that under s 188(4) of the *Employment Relations Act 2000*, in an amendment to the original Act, the Employment Court is prohibited from advising or directing the Employment Relations Authority in relation to its procedures.[135]

Further uncertainty was caused by the fact that on a number of occasions the Court of Appeal overturned decisions of the Employment Court and supported the approach taken by the Employment Tribunal. In *GFW Agri-Products Ltd v Gibson* the Court of Appeal thus criticised the Employment Court's direction of the Employment Tribunal on the application of s 33:[136]

> [W]e consider the Chief Judge went rather too far in some of his remarks in his principal judgment critical of the "relatively strict approach" of the Tribunal and directing a more liberal approach to applications for leave under s 33. … [I]n upholding the decision we do not wish to be taken as endorsing the Employment Court judgment so far as it reversed the decision of the Employment Tribunal on the leave application.

b) Lack of Certainty

The alleged lack of certainty caused by judicial interpretation in the case law meant that guidance could not be ascertained from the *Employment Contracts Act 1991* alone.[137] Adjudicators needed to refer to and apply precedent which 'expand[ed] on and qualif[ied]' 'plain and simple' concepts.[138] The increased influence of the Court of Appeal and the fact that their decisions sometimes conflicted with those of the Employment Court only resulted in further confusion.[139] As the Employment Tribunal

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[135] *Employment Relations Act 2000*, s 188(4), Role in relation to jurisdiction – It is not a function of the Court to advise or direct the Authority in relation to:
(a) the exercise of its investigative role, powers, and jurisdiction; or
(b)the procedure –
(i) that it has followed, is following, or is intending to follow; or
(ii) without limiting subparagraph, that it may follow or adopt.

[136] *GFW Agri-Products Ltd v Gibson* [1995] 1 ERNZ 323 (CA).

[137] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' [1996] 21(1) NZJIR 21, 30–31.

[138] Ibid NZJIR 21, 30.

[139] Ibid.

was bound by the decisions of higher courts it was not surprising that legal arguments on principles derived from those courts were increasingly being applied in the Employment Tribunal. This again acted against the principle of a low level operation.

The Courts' development of case law meant that parties needed to have a greater knowledge and understanding of employment law than could be gained from a simple reading of the Act and Regulations. For example, the concept of what 'unjustified' meant was the subject of a large number of cases which the average employer would not generally be aware of. Hughes, discussing the Issues Paper on Personal Grievances,[140] commented that employers claimed to be uncertain of their obligations, particularly in relation to the minimum requirements for procedural fairness in dismissal. Employers claimed that the case law was 'complex and difficult to assess without expert advice',[141] created problems with compliance costs and encouraged settlement of unmeritorious claims.[142] These views were expressed by Louise Freyer in her essay on 'Procedural Fairness and the Employer', where she commented that:[143]

> It is surely not unreasonable to ask how there can be fairness to the employer when the procedural requirements are contained in an ever-increasing and complicated body of law which is not easily accessible to and digestible by the average employer, whose conduct is often subject to the pedantic scrutiny of the Courts.

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[140] John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136. This paper was from the Office of the Minister of Labour, addressed to the Chair of the Cabinet Committee on Strategy and Priorities, October 1997.
[141] Ibid 137.
[142] Ibid.
[143] Louise Freyer, 'Unjustifiable Dismissal: Procedural Fairness and the Employer' (1997) 22(2) NZJIR143, 148. This was the winning essay in the 1996 Industrial Relations Student Research Paper Competition.

However, Hughes' believed that 'the complexity of the case law [was] considerably overstated'.[144] It is submitted that the law relating to dismissals was well settled and had been operating effectively long before the *Employment Contracts Act 1991* came into effect. In the *Unilever*[145] case in 1990, Goddard CJ said that procedural fairness was almost identical to natural justice and 'a moment's reflection show[ed] that this [did] not involve any injustice for or harshness towards employers.'[146]

The expectation that the Employment Tribunal would have followed the decisions of the Employment Court was clearly articulated by Goddard CJ in a case determined under the *Labour Relations Act 1987*. He anticipated that the Employment Tribunal:[147]

> …may, if it sees fit, establish a jurisprudence based in part upon consistency of decisions made by members of the tribunal. I hope that it will but it is entirely a matter for the tribunal; but should it feel free not to follow its own decisions, it will not – I venture to suggest – be entitled to exercise the same freedom in relation to relevant judgments of the higher tiers, the Employment Court and the Court of Appeal.

However, it is clear from this thesis survey of Employment Tribunal adjudicators that they had differing attitudes concerning their obligation to follow the directions of the Court. In fact, when asked about their attitude to the Court's directions on remedies one adjudicator stated:

> I ignored them. They're so bloody inconsistent in that Court. For two or three years they'll be thumping one way of approach, then they completely back track.

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[144] John Hughes, 'The Issues Paper on Personal Grievances' [1997] ELB 136, 137.
[145] *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35.
[146] Ibid 46.
[147] *New Zealand Public Service Association v Electricity Corporation of NZ Ltd, Marketing Division* [1991] 2 ERNZ 365, 380, Goddard CJ.

While adjudicators clearly understood their obligation it seems they did not always follow the letter of the law one suggested:

> The proper answer is that the Tribunal had to follow the Court's decisions… I said that's the proper answer, but in some cases lip service may be paid to it, ha ha. That's not to say that I don't sit there and say that Court decision is a load of rubbish, and I won't sort of find a way that I can say that that Court decision doesn't actually apply to the facts of this case.

8.2.1(c) EMPLOYMENT TRIBUNAL DISCRETION TO SET OWN PROCEDURE

The Employment Tribunal's ability to vary its procedure under s 88(1) *Employment Contracts Act 1991* should have enabled it to adapt processes to accommodate language barriers, cultural differences, disability requirements and self-represented parties, to provide equal access to justice without discrimination and adjudicators all said they varied process to ensure justice. However, despite the legislative intent, in practice it did not always occur. The *Employment Tribunal Regulations 1991* stipulated the procedure which the Employment Tribunal was required to follow but the frequent use of lawyers as representatives worked against any attempt to create an informal and non-legalistic procedure. The influence of the Employment Court on the Tribunal, discussed above, also meant that in practice this power of discretion had little impact.[148]

This thesis research has shown that the overall experience of participants was that the process remained formal and intimidating.[149] The factors contributing to this perception are discussed in detail above. However, some changes were made to allow

[148] See above, 8.2.1(b).
[149] See Chapters 7.5.2, 7.5.5, and 6.4.1 for comments on formality.

for greater participation of Maori and people with disabilities.[150] Language barriers were also discussed in the case of *Zinck v Sleepyhead*[151] where Judge Colgan said that although the *New Zealand Bill of Rights Act 1990* did not require the Employment Tribunal to pay for an interpreter, natural justice would have suggested that if a party or witness required the assistance of an interpreter then the Employment Tribunal may have had to adjourn the hearing until an interpreter could be arranged. He drew a distinction between a criminal case where liberty may have been an issue, and s 24(g) of the *New Zealand Bill of Rights Act 1990* that required a free interpreter be provided, and civil cases such as a personal grievance. It is submitted that the importance of the possible loss of a job should have meant that an interpreter would always be provided. Judge Colgan suggested that 'in cases of genuine need and hardship' the Tribunal should have accepted that they should pay for interpreter services.[152]

Under s 88(1) the Employment Tribunal had discretion to alter its procedure in claims of sexual harassment. However, as indicated in the interviews with adjudicators in Chapter Six and data from the Employment Tribunal, very few adjudicators heard these types of cases.[153] The removal of the special procedures that had existed under the *Labour Relations Act 1987*, and the Tribunal's failure to introduce a suitable replacement procedure meant that complainants preferred to take action through the Human Rights Commission rather than by means of a personal grievance.[154] Arguably

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[150] See, generally, chs 2, 3, and 6. See B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 294.
[151] *Zinck v Sleepyhead Manufacturing Company* [1995] 2 ERNZ 448, 458, Judge Colgan.
[152] Ibid 456, per Judge Colgan.
[153] See Chapter 6.5, Category 2: Types of Grievance, for comments from adjudicators in the research sample who heard these complaints.
[154] See Chapter 3.2.2.

this failure actually reduced access to justice for (usually female) complainants in this situation.

Section 34 of the *Employment Contracts Act 1991* allowed an adjudicator to decide a personal grievance on different grounds from those claimed.[155] This ensured access to justice if the applicant had erred in their initial claims.

The ability to vary the procedure should have been a way of ensuring the same access to justice for self-represented parties as those who had chosen to be represented. Adjudicators commented that they made a special effort in cases where parties were self-represented to ensure, firstly, that parties understood the procedure and secondly that the correct information was placed before the Employment Tribunal. Often Employment Tribunal adjudicators found it necessary to take a more relaxed approach in circumstances where parties represented themselves, particularly in relation to questions.[156] In contrast, some felt less willing to help representatives who they felt were incompetent as they considered it the responsibility of the representative to undertake their role effectively and that parties were responsible for their choice of representative. In practice then, self-represented persons would to some extent have had greater access to justice than represented parties may have had, depending on the quality of their representation.[157]

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[155] *Employment Contracts Act 1991* s 34; Nature of Grievance – Nothing in this Part of this Act or in any employment contract shall prevent a finding that a personal grievance is of a type other than that alleged. See also Chapter 2.3.3.
[156] See Chapter 6.4.8 and 6.7.7.
[157] See Chapter 6.7.8. See below, 8.2.3(a) for discussion of access to 'quality' representation.

Robbie's research showed that Employment Tribunal Members had a commitment to ensuring that the Tribunal operated in 'the spirit of the Act'.[158] She stated that adjudicators did not always require strict adherence to the Regulations in adjudication. Robbie believed that this would counteract the tendency of lawyers to take a litigious approach to employment problems. However, this was not supported by adjudicators interviewed for this thesis who said that there was a strong 'legal faction' in the Tribunal who 'won out' over those who preferred informality. An adjudicator in this thesis research suggested:[159]

> The Court treated the Tribunal like any other Tribunal when legislation dictated that it was to be quick, informal and inexpensive. The Tribunal came to be dominated by the legal profession. If the Tribunal had been brave enough to embrace the approach taken by the Mediation Service and Conciliation Service, which the ERA is now reverting to, it would have been a more effective body. The Court had a group of excessive legalists within the Tribunal [who] were responsible for the Tribunal being compromised by delays.

This was reinforced by one counsel's response to the thesis survey who indicated it was 'unduly cumbersome for the issues'.

8.2.1(D) SPEEDY

Only two years after the passage of the *Employment Contracts Act 1991* it was already clear that the National Government's intention that the ideal of the Employment Tribunal process being 'speedy', captured in s 76(c),[160] was not being met. According to one National MP, Max Bradford, while the Employment Tribunal was in theory 'highly accessible' a substantial backlog had arisen which had slowed

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[158] Margaret Robbie, *Representation, Procedure and Process in Mediation and adjudication Since the Employment Contracts Act*, (1993) Waikato Polytechnic, vi.
[159] See Chapter 6.4.1.
[160] *Employment Contracts Act 1991*, s 76(c), 'A low level, informal, specialist Employment Tribunal to provide speedy, fair and just resolution of difference.'

down the whole process and meant that parties faced a considerable delay in obtaining a hearing.[161] In 1997, a hearing occurred 16 months from notification on average.

Most commentators agree that any delay in a legal process will cause problems with access to justice. Whatever the reason for the delay, it will have an impact on parties attempting to use the procedure. Sir Ivor Richardson has identified that decisions of the courts must be delivered promptly to ensure that remedies are effective. He went on to say that: [162]

> A number of reports in recent years, including the Woolf report in 1996, have stressed that efficiency and speed are important features of the right of access to justice.

Judge Finnegan in *Meharry v Guardall Alarms New Zealand Ltd* overall suggested of the Employment Tribunal that it should:[163]

> …strive therefore to meet the objects set out for the Tribunal in s 76 of the Act, particularly in the circumstances of this case the object at s 76(c). In hearing and determining the present matter therefore the Court sees itself as intended by the legislature to be a "low level, informal, specialist… [t]ribunal to provide [a] speedy, fair, and just resolution of [the] differences between [the] parties…, it being recognised that in some cases mutual resolution is either inappropriate or impossible".

8.2.2 Causes of Delay

Adjudicators surveyed for this thesis advised that there had been a substantial backlog of personal grievance cases filed under the *Labour Relations Act 1987* and still

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[161] Max Bradford, MP, *The Future of the Employment Court and Tribunal: The Government View*, Speech Notes to New Zealand Institute of Industrial Relations Research Seminar, 23 April 1993, 12–13.
[162] Sir Ivor Richardson, 'The Courts and Access to Justice' 31 (2000) *Victoria University of Wellington Law Review* 163, 167.
[163] *Meharry v Guardall Alarms New Zealand Ltd* [1991] 3 ERNZ 305.

waiting to be heard when the *Employment Contracts Act 1991* came into force.[164] This was exacerbated by the three-month delay between the *Employment Contracts Act 1991* coming into effect and the 19th of August 1991 when the Employment Tribunal was able to hear its first claims. During this three-month period a 'steady influx of claims' added to the already outstanding workload.[165]

8.2.2(a) Increased numbers and coverage

Dumbleton identified the increased coverage of the personal grievance option to all employees, rather than just union members, as a significant factor in delays experienced in the Employment Tribunal.[166] As a result many more applications were received than prior to the *Employment Contracts Act 1991* (described as a 'veritable explosion' by Max Bradford, MP)[167] and the union sifting of unmeritorious claims had a less significant affect. The greater public awareness of personal rights generally may also have been a factor in the increased number of personal grievances pursued.[168] The numbers of applicants lodging personal grievances and other types of actions continued to increase after the initial 'testing out' period of the new Employment Tribunal system.[169]

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[164] Also, see Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR 21, 29. Dumbleton said this backlog of cases continued to occupy Auckland 'most of the time of most of the adjudicators' in Auckland until 'well into 1992.' See also, W R C Gardiner, 'The Employment Tribunal (A Report from the Trenches)', 13 May 1998, 2.

[165] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR21, 29.

[166] Ibid. See also Bradford M, 'Report of the Labour Committee on the Employment Contracts Bill' (April 1991).

[167] Ibid. Bradford said that 'in 1990, the last year of the old system, the mediation service and Labour Court dealt with 1100 personal grievances. In 1992, nearly twice as many, 2139, were handled by the Employment Tribunal.' See also Roth P, 'Editorial: The Cost of "Individualising" Labour Law' [1997] 5 ELB 81.

[168] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR21, 29. 'The rights awareness of the public generally was expanding and the inclination of people to challenge all kinds of perceived breaches of rights was growing; the Privacy Act, the Bill of Rights Act, and the Human Rights Act were enacted in or recently before 1993.'

[169] Ibid at 21, 29.

8.2.2(B) INADEQUATE RESOURCES

Dumbleton suggested delays were compounded by a lack of resources, including staff, both support staff and Members.[170] The original number of Employment Tribunal members had to be increased but this process took considerable time, causing the accumulation of further backlog and longer delays.[171] Some representatives surveyed in this thesis commented on the resourcing issue thus:

> It started off okay, but inadequate resources committed by Government and the length of the wait gradually increased in most centres. (Counsel)
>
> Under-resourced. (Counsel)
>
> Should not have been the wait to get a hearing – Government gave inadequate funding to the Employment Tribunal.

Adjudicators also commented on resourcing problems as:

> The problems it had were not of its own making – there was a backlog from the [Labour Relations Act] and [Employment Contracts Act] and not enough Tribunal members for the case loads.
>
> The Tribunal did a good job under difficult circumstances of being insufficiently resourced. The problems with it could have been remedied rather than throwing the baby out with the bath water.
>
> It operated well; the only problem was backlog and resourcing. There is heaps more money in the new system.
>
> The Tribunal was hamstrung by resourcing issues and by the Court.

Neville Taylor, in 1996, also discussed the inadequate resourcing of the Employment Tribunal and highlighted the inequitable 'shortfall between demand and

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[170] See Chapter 6.9. Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR21, 29.
[171] Ibid. The number of Members was doubled, but not until the end of 1994. See Chapter 6.9.

resourcing.'[172] He also identified geographical differences in access to justice caused by delays. Taylor described the marked difference in relative 'speed' according to where people lived and worked,[173] describing it as 'disparate and unreasonable. It shows that the resources are not allocated equitably.'[174]

However, the findings of this thesis research did not show the same marked geographical difference in time delay. The greatest variation between centres was the delay between date of hearing and date of decision and length of hearing.[175] It is submitted that access to justice is not complete until the final decision has been made and the relevant remedies paid. Taylor gave the example of one of his clients who had to wait over a year for a decision. In the meantime the business had been sold which caused 'difficulties in enforcing the judgment.'[176] One representative surveyed for this thesis commented:

> Some adjudicators, and it may be added, judges also, took inordinately long to deliver a decision, and by the time they did they had lost the plot. There are examples of twelve months after hearing for decision to be given. Presently I am awaiting an Employment Court decision on an appeal argued eight months ago. (Counsel)

8.2.2(c) Complexity of legal process

The complexity of the process, both before and during adjudication and the significantly increased use of legal representation, discussed in detail above, added to issues of delay in adjudication.[177] Further, the lack of the option of a *de novo* hearing led to increased legal argument and volume of evidence being adduced at the hearing

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[172] Neville Taylor, 'The Employment Tribunal – Is There a Better Way?' [1996] ELB 101, 102.
[173] Ibid. These differences are outlined in Chapter 5.4.9.
[174] Ibid.
[175] See Chapter 5.4.9, Time Factors and compare Tables 5.37, 5.38 and 5.40. See also, Chapter 6.4.10.
[176] Neville Taylor, 'The Employment Tribunal – Is There a Better Way?' [1996] ELB 101, 102.
[177] See above 8.2.1 See also Chapter 7.5.6 that discusses the impact of time on parties.

with one counsel suggesting: 'The process, like most Court proceedings, was protracted due to the evidence produced.'[178]

Commentators have also argued that lawyers have an economic incentive to complicate and extend legal processes, suggesting the more complex and lengthy the case the greater the financial return to lawyers.[179] Lord Woolf, in his Interim Report on the civil justice system in England and Wales,[180] observed that an adversarial system encourages an 'adversarial culture' and a 'battlefield' mentality.[181] He believed that complex rules and procedures encouraged the use of adversarial tactics and 'is considered by many to require it'.[182] He advocated greater judicial control of procedures to ensure that both the complexity and pace of the legal process were placed in the hands of the courts rather than the lawyers.[183]

In response to Lord Woolf's arguments, Zuckerman agreed that changing the process was important, but took the view that this did not go far enough.[184] A complete change to the culture of the legal profession itself would be essential before any real change could occur, as lawyers have 'economic incentives to complicate and protract litigation.'[185] Zuckerman argued that any attempt to make the legal process more

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[178] See 8.2.1(a).
[179] See Chapter 7.6.2 for discussion on fees and costs of representatives.
[180] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System* (June 1995) ch 3, 7.
[181] Ibid.
[182] Ibid.
[183] Ibid 7–8. See below; 8.3 re case management.
[184] A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change…' [1996] 59(6) *The Modern Law Review* 773.
[185] Ibid 775. At 773, Zuckerman argued that the high costs of litigation are the result of the financial interest which lawyers have in litigation rather than the complexity of the procedure.

accessible and affordable 'can and will be defeated by those with an economic interest in doing so.'[186]

8.2.2(D) HEARING AND DECISION TIMES

Problems with the length of time taken to get a hearing date after a personal grievance was lodged,[187] time taken in the hearing itself[188] and the length of time taken for a written decision to be provided[189] have been discussed in detail in Chapters Five and Six of this thesis.[190] This was reinforced by the responses from participants in the thesis survey who said amongst other comments that:

> Adjudication took full day. Process from filing proceedings would have taken months, possibly one year. (Advocate for respondent)
>
> Most cases took one year. (Advocate for applicant)
>
> Took too long to get hearings and the hearings themselves were often unduly lengthy (and therefore expensive). (Counsel)
>
> The hearing was dealt with quickly but it took months or over a year to get it. (Counsel)
>
> Long wait for hearing followed by long wait for reserved decision.
>
> There is insufficient accountability from some individual members on their output etc. The voice of people going through the system didn't get heard. The delay in putting out decisions was the worst part. (Adjudicator)

In 1994, Skiffington expressed concern that despite increases in staffing average waiting times remained high – eight months in the North Island and six months in the South Island. She was particularly concerned about an increase in the number of

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[186] Ibid. See below 8.2.3, for further discussion.
[187] See Table 5.37.
[188] See Table 5.38.
[189] See Table 5.40.
[190] See Chapter 6.4.10.

applicants who had withdrawn their claims and suggested that they may have been 'just giving up on the process.'[191]

Zuckerman argued that the legal profession has an economic interest in extending the procedure unnecessarily by using interlocutory applications 'generally of a tactical nature, which may be of dubious benefit even to the party making the application, and which may not be warranted by the costs involved.'[192] While opportunities for interlocutory applications in the adjudication procedure under the *Employment Contracts Act 1991* were more limited than in the general courts, representatives could extend the procedure by engaging in a 'paper war' between the parties or by tactical applications, one counsel suggested:

> Time to get to a hearing was egregiously long. It was difficult to "jump the queue" even when interim reinstatement was sought. Sometimes interim reinstatement was claimed so as to get an early hearing, but (rightly) abandoned at that hearing.

8.2.2(E) EFFECT OF DELAY ON ACCESS TO JUSTICE

Delay in resolving personal grievances disadvantaged both parties. Employees had the uncertainty as to whether or not their personal grievance claim would be successful and a consequent delay in receiving any compensation awarded. Time away from the workplace and co-workers is also a disadvantage to any employee. Delay also made the situation very difficult if the employee had sought reinstatement as the employer may have made an appointment to their position or circumstances changed. According

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[191] Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55. Skiffington quoted withdrawals of 'up to 47 percent' for adjudications.
[192] A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change…' [1996] 59(6) *The Modern Law Review* 773, 777, citing Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System* (1996) ch 7, para 23.

to Employment Tribunal member David Miller, members' were conscious of 'the need to dispense of [sic] reinstatement grievances quickly' and, in conjunction with Employment Tribunal members, give them priority, including in the writing of decisions where reinstatement was at stake.[193] He believed that reinstatement remained a realistic possibility. However, these comments were made in 1993 and waiting times lengthened as problems compounded, so that by 1996, waiting times for adjudication were between seven and nine months in the various centres.[194] For employers, delay resulted in them being unable to determine their liability, for loss of wages in particular. 'The greater the delay in having the matter determined or settled [would] often mean that the employer [was] required to pay a larger amount as remedy to the employee.'[195]

For those on low incomes and those without alternative means of support, delay waiting for adjudication could have caused serious financial hardship.[196] For those who had lodged a personal grievance it was possible to claim the Unemployment Benefit from Work and Income New Zealand, however this was unlikely to have covered all the costs incurred by employees while waiting for adjudication.

Dumbleton however, writing in the *New Zealand Journal of Industrial Relations*, argued that delays in getting an adjudication hearing could have served a useful purpose, acting as an incentive to parties to have their personal grievances go to

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[193] See *A v Foodstuffs (South Island) Ltd* [1993] 1 ERNZ 81, 84, Employment Tribunal, D S Miller. Miller was reacting to an article in the *Press* which claimed that 'delays of up to six months for Employment Tribunal hearings [were] causing financial and emotional stress for complainants.' *Christchurch Press*, 27 November 1992.
[194] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR 21, 24.
[195] Neville Taylor, 'The Employment Tribunal – Is There a Better Way?' [1996] ELB 101, 102.
[196] Ellen J Dannin, *Working Free-The Origins And Impact Of New Zealand's Employment Contracts Act* (1997), 108.

mediation.[197] He said that it would have been inappropriate for those who refused to attend mediation to have their cases heard at adjudication sooner than those who had made the effort to resolve the issues at mediation, thus encouraging resolution of employment issues at the lowest possible level. He suggested that:[198]

> Given that the Tribunal does not have the unlimited membership or the resources to be able to give the same priority to both mediation cases and adjudication cases, it is appropriate that there should be some differential in waiting time so that mediation can be made available relatively quickly to those seeking it. Citizens have a proper interest in seeing that, in the delivery of justice, the state provided resources of the courts and tribunals are used in ways that are most productive and economic. The statistical likelihood is that mediation will resolve a dispute brought to the Tribunal, and from the viewpoint of efficiency and economy, mediation is clearly superior to adjudication… Should the mediation turn out to be unsuccessful, the parties are not penalised with any more waiting time in the queue to adjudication than would have been required if mediation had not been attempted.

Dumbleton's analysis also showed that the difference between the waiting times for mediation and adjudication in the main centres was variable.[199] This may have been an explanation for a comment received for this thesis from one representative:

> Under the *Employment Contracts Act*, mediation was too long after the events and quite close to an adjudication date. "Losses" had accumulated; why settle if a hearing is so close? Contrast with current situation where mediation is within weeks. Also, hurt feelings are magnified by delay.

The above quote identified the potential emotional impact of delay on parties. It is supposed that delay may have caused increased feelings of anxiety and anger. This in turn may have led to the parties becoming more entrenched in their positions and therefore less likely to resolve the personal grievance at a lower level. Another counsel surveyed for this thesis said that mediation had failed because the 'attitude of

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[197] Alastair Dumbleton, 'The Employment Tribunal – Four Years On' (1996) 21(1) NZJIR 21, 24.
[198] Ibid.
[199] Ibid.

employee and employer had hardened' and 'personality issues needed the airing of the grievance'.

8.2.3 FAIR AND JUST RESOLUTION

Under s 76(c) of the *Employment Contracts Act 1991* one of the objects of the Act was that the Employment Tribunal should 'provide fair and just resolution of differences between parties to employment contracts, it being recognised that in some cases mutual resolution is either inappropriate or impossible.' The wording of this section implied that adjudication was only intended to settle differences that could not be resolved by 'mutual resolution' during mediation however, mediation was not compulsory under the *Employment Contracts Act 1991*.

The 'fair and just resolution' of differences relates to the issues of natural justice discussed above and encompasses such matters as costs and their effect on outcomes and real access to justice for participants.[200] This again highlights the tension between the need to be fair and also to provide natural justice to all parties and, the necessity to go through a transparent procedure.

The issue of just outcomes was illustrated by one submission to the Minority Report of the Labour Select Committee in 1993, where a dismissed employee had been awarded $18,000 by the Employment Tribunal for unjustified dismissal. The award was made 17 months after the dismissal and 21 months later he had still not received the compensation. In addition, he had incurred $26,000 in legal costs. The grievant found the experience 'far from speedy, fair or just and I can only express my extreme

[200] See Chapter 3.3.

concern for other workers who are under the false impression that the Act provides adequate protection.'[201]

One of the adverse effects of delay in the personal grievance procedure was the additional costs involved. For simplicity, the broad issue of costs as a barrier to access to justice has been divided into four parts, the cost of representation, costs in addition to representation, the effect of adverse party costs, that is, costs awarded against the 'losing' party, and the effect of the legal principles applied by the courts in assessing costs, on the outcomes for parties.

8.2.3(A) COST OF REPRESENTATION (INCLUDING LEGAL AID ISSUES)

Under s 59 of the *Employment Contracts Act 1991* an employee or employer was entitled to choose 'any other person' to be their representative for any action under the Act. To lodge a personal grievance in the specialist employment institutions under the previous *Labour Relations Act 1987*, union membership was generally required. Membership 'paid off', acting as 'fire insurance'[202] not only against the actual cost of taking a case but also 'indemnifying the member against an award of costs if the case [was] unsuccessful.'[203] Union representation also meant that 'otherwise "uneconomic" cases' were worth taking and an employee who won 'an average award for being unfairly dismissed [got] the full benefit of their compensation.'[204]

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[201] *Report of the Minority of the Labour Select Committee on the Inquiry into the Effects of the Employment Contracts Act on the New Zealand Labour Market,* New Zealand House of representatives, 21 September 1993, 23. Cited in Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on…' (1994) 4 ELB 55.
[202] W R C Gardiner, 'The Employment Tribunal (A Report from the Trenches)', 13 May 1998, 10.
[203] Andrew Little, NZ Engineering Union, Letter published in *Employment Today*, March 1995, cited in W R C Gardiner, 'The Employment Tribunal (A Report from the Trenches)', 13 May 1998, 10.
[204] Ibid 11.

The change to the 'nature' of representation brought about by the *Employment Contracts Act 1991*, discussed in previous chapters,[205] had a deterrent effect on parties even engaging in the process, not only because of the intimidating atmosphere associated with the legal profession[206] but also the cost of legal representation. The issue of increased formality introduced by the *Employment Contracts Act 1991*, discussed above, meant that adjudication was longer and more complex than the system under the *Labour Relations Act 1987*. This entailed a greater reliance on lawyers and therefore increased cost.[207]

If an employee wanted to take a personal grievance against their employer and they were not a union member, one of the first issues to be considered was the cost of a lawyer or advocate. This had an 'inhibiting effect on access to justice',[208] as most people would not qualify for legal aid.[209] As Harris has said, 'the prospect of a substantial legal bill discourages many people, who believe they have been wronged, from seeking through the courts the redress to which they are entitled.'[210] Although it was possible to seek a review of lawyers' fees through District Law Societies, this was yet another hurdle for parties to face and advocates were not subject to the jurisdiction of the Law Society as they did not generally hold practicing certificates.

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[205] See Chapter 5.4.4, Representation, and 8.2.1(A)(a), Informal – Accusations of Legalism.
[206] See above for discussion, 8.2.1(a). See also Department of Justice, *Te Whainga I Te Tika; In Search of Justice*, Report of the Advisory Committee on Legal Services (1986) 37; 7.
[207] See above 8.2.1 and 8.2.2.
[208] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 301.
[209] See Chapter 5.4.8(a) for legal aid levels. See discussion below.
[210] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 301. See also, Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System* (June 1995) ch 3, 9. Lord Woolf said, 'Excessive cost deters people from making or defending claims. A number of businesses have told me that it is often cheaper to pay up, irrespective of the merits, than to defend an action. For individual litigants the unaffordable cost of litigation constitutes a denial of access to justice.'

Harris gave three reasons for the generally high cost of litigation. First, the practical reality for most litigants was that to access the system they had to use the services of a lawyer. (In the employment law situation this could be lawyers or advocates). Secondly, legal representation and necessary research is time-consuming and therefore expensive, as most lawyers charge on an hourly rate.[211] Third, representatives' hourly rates are usually high and include payment for the task involved, its complexity and time commitment.[212] Harris said that lawyers justify their high rates on the basis of their training, skill and responsibility.[213]

Access to justice depends upon how the process treats the participants. Justice is taken away if the expense of prosecuting the case negates the compensation and costs awarded, even when the applicant is successful. Lord Woolf identified that the problem of disproportionate cost was 'most acute in smaller cases where the costs of litigation, for one side alone, frequently equal or exceed the value of what is at issue.'[214] Although Lord Woolf was talking about the courts generally, this comment is particularly relevant in the employment arena as a high proportion of claims were for relatively small amounts and remedies granted were modest.[215] This was often the case in adjudication under the *Employment Contracts Act 1991*, as was borne out by the following comments from counsel surveyed for this thesis:

> No [Not inexpensive]. Costs outweigh benefits. The result is important and the process itself should be careful and accurate, so costs are inevitable. The remedies, however, are modest, perhaps unduly modest unless successful employees are also given worthwhile costs awards.

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[211] See Table 7.22 for breakdown of how surveyed representatives charged their fees.
[212] See Chapter 7.6.2 for discussion on the basis on which surveyed representatives set their fees.
[213] Harris, B V, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 301.
[214] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System* (June 1995) ch 3, 9.
[215] See Chapter 5.4.7 and Tables 5.21, 5.24 and 5.25, for remedies sought and granted.

> The Tribunal costs "tariff" of $1,000 - $1,500 per day is stupid for all but exceptional cases.
>
> Claim was patently hopeless but cost my client close to $10k to resolve.
>
> Claim was for modest wages – less than fee charged.

The cost of representation in proportion to compensation awarded was highlighted in *Okeby v Computer Associates* where an 'unremarkable' personal grievance case cost the applicant a 'grand total of $18,622.80'.[216]

> Although, as can be seen and as was common ground, the appellant's personal grievance was unremarkable, it was obviously a case of importance to the parties for its hearing occupied two and a half days and apparently required, since it received, the attention of two counsel on each side. It is fair to mention that the appellant's solicitors have made no charge against their client, let alone any claim against the respondent, for the junior counsel's attendance at the hearing. Despite this concession, the appellant's costs came to $16,000, augmented by GST to $18,000 and by a hearing fee of $300, a filing fee of $35, photocopying of $212.80, and library copies of judgments costing $75, to a grand total of $18,622.80. The decision appealed from awarded $3,000 inclusive of GST, the hearing fee of $300, and half of the remaining disbursements. The professional time spent was in the order of 60 hours, so its actual cost including GST can be seen as around $300 per hour. The amount awarded also including GST, viewed from the same perspective, is equivalent to $50 an hour.

Harris saw four possible ways of dealing with the issue of representation costs in the general courts; dispense with legal representation altogether, like, for example the Disputes Tribunal; state funding of legal representation, for example by legal aid; reform the legal process to increase its speed and efficiency, and the use of conditional or contingent fee arrangements.[217]

The response to the need for greater efficiency in the ordinary courts has been to introduce a case management approach to litigation.[218] Case management was designed to give the court greater control over the timelines for litigation and 'the

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[216] *Okeby v Computer Associates (NZ Ltd)* [1994] 1 ERNZ 613, 615, per Goddard CJ.
[217] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev, 282, 302.
[218] Ibid. Harris cited High Court Practice Note of 24 March 1994 as authority for case management trials implemented in Auckland and Napier from 1 May 1994.

refining of factual and legal issues, leading up to settlement or trial.'[219] Lord Woolf's report on access to justice in England pointed out that in litigation generally, control over the 'initiation and conduct' of each case rested in the hands of the parties.[220] He believed that:[221]

> [w]ithout effective judicial control… questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is often unreasonable.

According to adjudicators in this thesis survey, a case management system was adopted in the Wellington region for employment adjudication cases. This meant that significant issues could be identified prior to adjudication and any factual questions clarified before the hearing. This may have resulted in some reduction in time between initiation of the personal grievance and the hearing however, it may not have reduced cost to the parties, as preparing briefs of evidence or any process to clarify issues required time spent by the lawyer.

In response to Lord Woolf's proposed reforms of the English courts, Zuckerman said that although he supported the strategy suggested he thought it was susceptible to the same subversive interests that had 'defeated all past attempts at reform.'[222] Zuckerman argued that unless the factors that push costs up were addressed, the problem would remain unresolved and costs high. These factors were:[223]

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[219] Ibid 301.
[220] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System* (June 1995) ch 3, 7. Lord Woolf said that the cause of high costs was the uncontrolled nature of the process rather than its complexity.
[221] Ibid.
[222] A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change…' [1996] 59(6) *The Modern Law Review* 773, 773.
[223] Ibid.

> the system of remunerating lawyers on an hourly basis, which rewards complexity; the indemnity rule whereby the winner recovers his costs from the loser, which encourages a competition of investments in litigation; and the availability of almost unlimited legal aid funds.

The survey of representatives for this thesis clearly showed that the greatest proportion of representatives charged fees on a time-based system.[224] Zuckerman's view was that representatives who charged this way had little incentive to minimise costs and had a natural desire to get the best reward for their services.[225] He argued that lawyers paid by the amount of work undertaken usually used the court system even though there may have been a more effective and efficient way of resolving the issue. Further, the usual 'counterbalance' of the consumer's desire to ensure they receive value for money is lacking, as lay clients seldom have the necessary legal knowledge to be able to determine whether or not they have received a quality service.[226]

One contributor to the Woolf inquiry alleged that few lawyers work with a budget in mind.[227] It is submitted that although an hourly rate appeared to provide no incentive to work in a 'fully efficient way' representatives who attempted to reduce cost by limiting time spent on the case may not have been able to provide the standard of service or necessary time to ensure the client received fully competent representation.[228] The same problems occurred as a result of the low remuneration rates received for legally aided cases, discussed below.[229] These issues suggest that

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[224] See Chapter 7.6.2 and Table 7.22.
[225] A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change…' [1996] 59(6) *The Modern Law Review* 773, 776.
[226] Ibid 777. 'Due to the complexity of the law and its obscure terminology, lay clients have few means of assessing the quality of service provided by their lawyers.'
[227] Ibid 776, citing Judge Greenslade, who participated in the Woolf enquiry working parties.
[228] Ibid.
[229] See discussion below on legal aid.

unless an alternative system of charging is adopted by the legal profession the problems identified will not be resolved.

Discussion of the time spent by representatives inevitably leads back to the complexity of the process. In the *Okeby* case, the respondent argued that by engaging a high profile 'Rolls Royce' law firm the appellant had chosen to proceed on a 'no costs spared basis'.[230] The respondent contended that it would be unreasonable for the Employment Tribunal to award costs on the basis of the appellant's choice of a 'top of the line' representative. Goddard CJ questioned whether representation could have been obtained more cheaply and if so whether it was reasonable to expect the appellant to do so. He acknowledged that there were limited opportunities for parties to 'shop around' the market for lower cost representation and that 'within reason, effect should be given to the statutory right to resort to competent representation of the litigant's choice.'[231] He also noted that the respondent was aware of the appellant's choice of representative and that he therefore should have been aware that any costs awarded against him were likely to be high. These issues raise the question as to whether equal access to justice means everyone should have access to the best representation available (assuming that counsel *are* the best). In contrast, commenting upon cheaper non-lawyer advocacy Judge Castle in *Harris v Nurse Maude* [1991] opines:[232]

> The engagement of an advocate instead of counsel directly resulted in a substantial reduction of costs which would have otherwise had to have been faced by Mrs Harris had she retained counsel. The outcome of her case is evidence of the skill possessed by her advocate. Nonetheless, the circumstances of her whole case would clearly have justified the engagement of senior counsel. That observation draws a large measure of support from the fact that the

[230] *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613, 615.
[231] Ibid 621, Goddard CJ. See s 10 *Employment Contracts Act 1991*.
[232] *Harris v Nurse Maude* [1991] 3 ERNZ.

> first respondent took precisely that course by instructing and seeking advice from senior counsel immediately after Mrs Harris had been suspended from her employment.

From these examples it can be seen that a party's financial circumstances could have a major affect on the type of representation that was chosen and consequently on access to justice both in terms of the cost of the process and the justice of the ultimate outcome. A *Pyrrhic* victory is not a just outcome.

In Chapter Seven of this thesis, the cost of representation was clearly found to have an impact on the choice of representative for some applicants.[233] In Chapter Five, this thesis found that there was some small difference in outcomes (levels of compensation) depending on the type of representation chosen.[234] This was in contrast to Ian McAndrew and Kathryn Beck's findings, which indicated that those who chose counsel as representatives, rather than advocates, received higher levels of compensation.[235] In McAndrew and Beck's research, those who represented themselves fared worst of all, in contrast to this research which found that self-representatives fared better than those represented by counsel or advocates.[236] A significant difference between the two pieces of research was that McAndrew's research was carried out over each year that the *Employment Contracts Act 1991* was in force and covered all adjudicated decisions. In contrast, this thesis research only

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[233] See Chapter 7.4.1, 7.4.2, and Table 7.4.
[234] For a discussion on levels of compensation, see Chapter 5.4.7.
[235] Ian McAndrew and Kathryn Beck, *Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority*, Paper presented to the NZLS Employment Law Conference November 2002, 211. See also, Ian McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24(3) NZJIR 365, 374–381.
[236] See Chapter 6.4.5 for adjudicators' comments on self-represented parties and 6.4.12 for their approach to remedies granted. Few self representatives mean survey data is not conclusive.

looked at adjudications in personal grievances in 1997 and is more intensive.[237] This narrows these findings both in terms of the number of self-representatives included and the types of cases analysed. It may also be the case that adjudicators were more lenient with self-representatives in personal grievance cases.[238]

One significant issue for self-representatives was that they were unable to claim any costs for their time or any disbursements incurred.[239] Whilst they may have received fair compensation at the end of the process, costs and disbursements would have had to be paid as they were incurred.[240]

For those people who could not afford representation on a fee for time basis and did not have the skills to represent themselves, one alternative was to employ a representative on a conditional or contingency fee basis. This meant that no fees were payable unless the personal grievance was successful.[241] Conditional charging meant that it was not necessary for a client to pay legal fees 'up front', thus providing access to a service which they would otherwise have been unable to receive. The downside of contingency based charging is it encourages providers to pressure applicants to settle quickly or the overall charge is excessive in proportion to work undertaken. Any costs incurred would be paid out of any award of compensation received. However, the risk for the client of an award of costs against them remained.[242]

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[237] For discussion on why 1997 was chosen as a representative year, see Chapter 4.1.2.
[238] See Chapter 6.4.5.
[239] See Chapter 6.8.4 and Table 6.13.
[240] See Chapter 5.4.7 and Tables 5.28 and 5.29.
[241] A very small number of representatives surveyed indicated fees set on a contingency basis. See Table 7.22.
[242] See discussion below, para 8.2.3(c) on adverse party costs.

a) Legal Aid

One of the mechanisms used to achieve access to justice for poorer people in New Zealand was the legal aid scheme and use of community law centres. Community law centres did on occasion represent clients; however, the service was somewhat limited.[243] Legal aid was provided under the *Legal Services Act 1991*. Entitlement was determined by the *Legal Services Regulations 1991* which set the income and asset levels under which qualification for legal aid was determined.[244]

Access to legal aid was extremely restricted, as it depended on the income and assets of the applicant and the threshold for disqualification was low.[245] For example, in 1995, to be entitled to legal aid a married man with three children would have had to earn less than $19,000 per annum and have disposable capital of $2000 or less.[246] The 1996 census gave median income figures for men of between $19,216 and $25,480 (depending on location of residency).[247] The figure for disposable capital was calculated after 'deductions for debts, interest in a house, domestic motor vehicle, household furniture, appliances, personal clothing and tools of trade.'[248] However, as discussed in Chapter Five of this thesis, whether or not these assets were exempt was at the discretion of the local District sub-committee of the Legal Services Board.[249]

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[243] Personal experience of the writer as a volunteer adviser: Christchurch Community Law Centre and previously at the Wellington Community Law Centre. 11% surveyed had legal aid see Chapter 7.6.3.
[244] *Legal Services Act 1991*, ss 10, 28 and 29 and sch 1; *Legal Services Regulations 1991*, regs 35 and 36.
[245] See Chapter 5.4.8(a) on the availability of legal aid, and Table 7.21 and related text. See also B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 302.
[246] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 302.
[247] See Chapter 5.4.7 and Tables 5.22 and 5.23.
[248] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 302.
[249] See Chapter 5.4.8(a).

The sub-committee could also take into account the resources of the applicant's spouse and parents.[250] This meant that few people qualified for legal aid and a large proportion of those on 'middle incomes' also lacked 'sufficient discretionary income' to meet high litigation costs, which might deny them access to justice.[251] In contrast, people with higher disposable income, or access to financial support would be able to exercise better choice and arguably be able to take full advantage of the legal system.

In addition, as previously noted the most popular means of resolving personal grievances was by mediation, with over 70 percent of personal grievances being resolved in this way. Legal aid was not available for mediation but was for adjudication. This therefore had the potential to deprive employees of access to justice as they could not obtain financial assistance for this first step.

Even if parties did qualify for legal aid it was granted on a loan basis and would require repayment, with possible charges over the applicant's income and assets.[252] The availability of legal aid, or other legal assistance through community law centres, would therefore have affected the legal aspirations of those with limited means.[253] In the *Review of the Legal Services Act 1991* the deterrent effect of the legal aid recovery system was noted as a concern for the Legal Services Board.[254] It was suggested that the loan and charging system reinforced the poverty trap and prevented some potential

[250] Ibid.
[251] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 302.
[252] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 302.
[253] Ibid.
[254] Legal Services Board, *Review of the Legal Services Act 1991* (1994) 9.

litigants from taking action.[255] However, according to a Legal Services Board review, the charging and loan regimes had created a more responsible attitude to litigation;[256]

> Without a charging regime there is little to discourage the excessive use of lawyers and legal services and the promotion of technical defences.

A further restriction on access to legal aid was the unwillingness of representatives to undertake legally aided work. The low remuneration rates for legal aid counsel acted as a disincentive for firms to take on legal aid work.[257] In 1997, Gabrielle Maxwell and others conducted a survey of legal practitioners' views on legal aid remuneration in both the civil and criminal jurisdictions.[258] In response to a question regarding the availability of suitably qualified lawyers to undertake legal aid work, fifty-nine percent of respondents said that pay rates were a 'very important' factor.[259] The availability of other, higher paying work was also a strong reason for lawyers not to undertake legal aid work. Some practitioners reported pressure from their firm to take on more highly paid work, however these were in the minority in Maxwell's survey.[260]

There was a perception that the quality of the services provided to legal aid clients was lower because fewer senior lawyers undertook this type of work. Maxwell's survey found that the majority of respondents were dissatisfied with the rates of legal aid remuneration payable to intermediate and senior lawyers and, in particular, the

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[255] Ibid. The Board said that 'those on low incomes eligible for aid tend to face a myriad of liabilities and repaying the cost of (often) unavoidable litigation simply adds one more to the burden.'
[256] Ibid.
[257] Gabrielle Maxwell, Paula Shepherd, and Alison Morris, *Legal Aid Remuneration: Practitioners' Views*, A Report to the Legal Services Board, Institute of Criminology (August 1997) 3–4.
[258] Ibid. The research consisted of two surveys, the first being of 439 practitioners currently practicing in the civil and criminal areas. The second was of 44 former criminal legal aid practitioners.
[259] Ibid 3 and 31.
[260] Ibid 3.

low rates for preparation time and appeals, which logically should have been taken on by senior practitioners.[261] Although Maxwell concluded that the recurring perception of the 'declining quality of legal aid provision because of inadequate remuneration [was] more illusory than real'[262] the earlier review of the *Legal Services Act 1991* had found the same perception that the rate of remuneration payable affected the quality of representation as it was often delegated to junior members of staff.[263] This meant that legal aid clients may have been more likely to receive poorer quality representation and therefore be deprived of a real opportunity to participate in the justice system and the opportunity to choose high quality representatives.

The question of whether limited access to justice is real access to justice must be balanced against the public interest in the cost of provision of legal aid. Harris acknowledged that the private interest in receiving access to justice through legal aid was constrained by the public interest in the necessity to raise taxes to pay for that access.[264] The conundrum of weighing up these competing interests was well summed up by Sir Ivor Richardson:[265]

> It is important that we think carefully as a society about the level of access to justice that people should be entitled to bearing in mind that resources are necessarily limited. Access to justice cannot require that the State ensures unlimited provision of legal services to everyone in every situation on a demand driven basis. That would unfairly divert resources away from other areas… [A] consideration is that the administration of justice involves the use and so the allocation of necessarily limited resources. The criticism is often made that the courts provide a Rolls Royce system and that the only people who can indulge in litigation, apart from those who have to, are the rich and the legally aided. Justice may be priceless. But it is not costless. The acceptable resolution of disputes involved balancing human rights and other moral values,

[261] Remuneration for legal aid practitioners were set at three levels – junior, intermediate and senior – based on the practitioner's level of experience.
[262] Maxwell et al, *Legal Aid Remuneration: Practitioners' Views*, A Report to the Legal Services Board, Institute of Criminology (August 1997) 5.
[263] Legal Services Board, *Review of the Legal Services Act 1991* (1994) 8.
[264] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 303.
[265] Sir Ivor Richardson, 'The Courts and Access to Justice' 31 (2000) VUWLR 163, 171.

> fairness considerations and resource constraints. My point is that proposals to limit legal aid cannot be dismissed out of hand as contrary to justice. Other public policy considerations involving competing claims on limited resources require a choice at the margin between expenditure on health, education, justice, social welfare, defence and so on. Just as in the decisions we make as individuals as to how we will spend our energies and our money, there are always policy trade-offs between efficiency, fairness and other individual and community values.

8.2.3(B) COSTS IN ADDITION TO REPRESENTATION

The initial cost or application fee to lodge a personal grievance was not high by average standards. However, they could have been prohibitive for those on low incomes or for those whose income had ceased due to dismissal. The lodging fee for adjudication of a personal grievance was initially $35.00 in 1991 but increased to $70.00 in 1997.[266] There was also an adjudication fee of $75.00 per half day after the first day of a hearing, which increased to $150.00 in 1997. The lodging fee was also only one small part of the cost issue. If an applicant was not a union member they may have been required to pay representation fees or a proportion of them, up front, together with any necessary disbursements. In some cases the opposing party may have applied to the Court for security for costs, where they had doubts about the applicant's ability to pay costs if their case was unsuccessful. [267]

Another issue for parties bringing cases before the Employment Tribunal was the geographical location of hearings. In late 1997 Matt Gilbert, then CEO of the Employment Institutions Service, announced that as a result of a review of expenditure adjudication would only be heard in the main centres and not in regional

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[266] *Employment Contracts Act 1991*, sch 3 and *Employment Tribunal Regulations 1991*, reg 53. Increased under the *Employment Court and Employment Tribunal (Fees) Regulations 1997*. See Chapter 2.4.1(e); Application to the Employment Tribunal.

[267] For discussion on security for costs see Goddard CJ's decision *Dawson v Mount Cook Landlines* [1992] 3 ERNZ 459.

towns.[268] Although this decision was reversed, the reaction to it highlighted the issues related to geographical location and their importance in the access to justice debate. Concerns were raised by newspapers, employment lawyers, advocates and the New Zealand Law Society Employment Law Committee. Phillipa Muir, the Chairperson of the latter committee, suggested that the decision compromised 'the Tribunal's ability to fulfil its statutory function in providing "speedy justice".'[269]

Geography remains 'a significant restriction on rights of access to justice to a large part of the New Zealand community.'[270] Rural parties face travel and accommodation costs for themselves, their witnesses and representative, or if they retain an urban representative, costs associated with maintaining contact with that representative. Taylor argued that if the proposed policy had been implemented in some cases costs would have doubled. This would have created a 'two-tiered system of justice'[271] between urban and rural areas, with those in urban areas having easier access to justice than rural dwellers. It is submitted that even though the policy was reversed, these concerns are still relevant to a proportion of parties who live outside smaller cities. Although the location of hearings would have created difficulties for some parties it is difficult to envisage a more effective alternative which would have provided greater access to justice.[272]

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[268] Internal memorandum from Matt Gilbert, 22 December 1997, cited in Neville Taylor, 'Countryfolk: Seen But not Heard?' [1998] ELB 10.
[269] Phillipa Muir, The Dominion, 24 December 1997, cited in Neville Taylor, 'Countryfolk: Seen But not Heard?' [1998] ELB 10, 11.
[270] Neville Taylor, 'Countryfolk: Seen But not Heard?' [1998] ELB 10, 11.
[271] Ibid.
[272] See below, 8.4.

Geography also had an impact in terms of delay and outcomes. It has been illustrated in Chapter Five that geographical location had an impact on both those using the adjudication process and to some extent, the eventual outcomes.[273] Compensation outcomes varied slightly in relation to geographical location, although not significantly.[274] It may have been that variations in compensation awarded related to such factors as the occupation of the applicant rather than any difference in approach of the adjudicators in a particular jurisdiction. This research found a number of factors that may have been influential in addition to the regional differences in experiences of those using the process. These included: the adjudicators' caseloads, the gender of the adjudicator and the applicant, the applicant's occupation and the adjudicator's background.[275]

In addition, different rates applied for legal aid in different geographical areas as the Legal Services Board in each area could set their own rates. Registrars in each area had the discretion to determine whether legal aid was granted, the contribution to be made by the applicant and whether any charges were to be made over the applicant's income and assets. Harris' view was that these discretions either granted or denied access to justice and that evidence suggested that the principles had not been applied consistently across the country.[276] This view was supported by Maxwell's survey of

[273] See Chapter 5.4.6 and 5.4.7; Remedies.
[274] See Chapter 5.4.7 and Table 5.24.
[275] See Chapter 5.4.6 and Table 5.14 (Gender of adjudicator as an indicator of applicant success); Table 5.15 (Gender of applicant and applicant success); Table 5.16 (Background of adjudicators as an indicator of applicant success); and Table 5.18 (Occupational class and applicant success.)
[276] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 303. In support of that contention Harris cited *In the Interests of Justice: An Evaluation of Criminal Legal Aid in New Zealand*, Legal Services Board (March 1995), an independent review of criminal legal aid.

legal aid practitioners in 1997, which identified a need for standardisation of approval practices across districts.[277]

8.2.3(c) PARTY COSTS

Section 98 of the *Employment Contracts Act 1991* gave the Employment Tribunal authority to make an order for costs. Section 108 was the equivalent provision for the Employment Court.[278] The normal rule was that costs would 'follow the event'.[279] In other words it was assumed that unless the court used its discretion to direct otherwise costs would be paid by the losing party. However, the Employment Court has made it clear that their discretion not only included the amount to be awarded but whether costs should be awarded at all.[280] The Employment Tribunal could decline an order for costs and allow costs to 'lie where they fall' or reduce a costs award on the basis of contributory fault where they believed the applicant had contributed to the action they complained of.[281]

In determining the level of costs to be awarded, the Employment Tribunal had the discretion to take into account principles well settled in a number of cases.[282] These principles gave 'a wide-ranging discretion… to do that which is just and right.'[283] The Employment Tribunal assessed costs based on a reasonable contribution to the

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[277] Maxwell et al, *Legal Aid Remuneration: Practitioners' Views*, A Report to the Legal Services Board, Institute of Criminology (August 1997) 5.
[278] See Chapter 2.4.3(d); Costs.
[279] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 43. Affirmed in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, 316 (CA).
[280] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 40.
[281] See Chapter 2.4.4, Chapter 5.4.7(d); re contributory fault.
[282] See, for example, *Unkovich v Air New Zealand* [1995] 1 ERNZ 336; *GWD Russells v Muir* [1993] 2 ERNZ 955 which were both decisions of the full Court. The Court of Appeal reinforced these principles in a trio of cases: *Victoria University of Wellington v Alton-Lee* [2001] 1 ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA).
[283] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 40, Goddard CJ.

successful party's costs which were 'reasonably and properly incurred',[284] and the means of the parties and the ability to pay of the party against whom the costs had been awarded.[285] The court sometimes had to accept the reality of the situation and not make an order for costs that would take the risk that they would 'overwhelm' the party and would never be paid.[286]

What amounted to a 'reasonable contribution' would depend on the circumstances of each case and involved a two-step approach.[287] Firstly, the Employment Tribunal had to examine the costs actually incurred by the party and determine whether or not they were reasonable, adjusting them if they were not. Secondly, the Employment Tribunal had to appraise the circumstances of the case and decide what level of contribution was appropriate. It was generally accepted that 66 percent was a useful starting point (the 'two-thirds rule') before other factors justifying an increase or decrease were taken into account.[288]

Costs were not intended as a punishment against the unsuccessful party or a means for the Employment Tribunal to express disapproval but to 'compensate a party which has been put to the expense in either asserting or defending a right.'[289] However, the

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[284] Ibid. Affirmed in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, 316 (CA).
[285] See *Adams v Alliance Textiles (NZ) Ltd* [1992] 3 ERNZ 822.
[286] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 46. At 43, Goddard CJ said that 'an award of costs should be neither illusory nor oppressive.'
[287] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, 443 (CA).
[288] Ibid.
[289] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 40, Goddard CJ. See *NZ Labourers etc IUOW v Fletcher Challenge Ltd* [1990] 1 NZILR 557.

award should not be so low that the value of any compensation awarded was negated.[290] As Goddard CJ indicated in *Okeby*:[291]

> After paying his costs and disbursements the appellant was left with $5,500 of the award of $24,000. It seems to me as a matter of first impression that such a result greatly favours the respondent and punishes the appellant by depriving him of most of the fruits of his victory, predominantly wages.

The conduct of the parties during the procedure could, however, be relevant if for example a party unduly lengthened the hearing by their conduct or presented irrelevant or unnecessarily complex legal argument.[292] However, the necessity to guard against presenting overly technical arguments was sometimes made difficult due to the lack of a *de novo* hearing and the need to present all possible arguments at first instance.[293] An unreasonable refusal to settle might also be taken into account when awarding costs.[294]

Conduct could also be a factor where the extent of the damage caused was so serious that it would have been unjust for the applicant to have borne any significant level of costs. This concern was illustrated in *Harris v Nurse Maude*,[295] a case heard under the

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[290] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 41. See *GWD Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 955.
[291] *Okeby v Computer Associates (NZ) Ltd* [1994] 1 ERNZ 613, 616-617, Goddard CJ.
[292] In *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 at 329 (CA246/94), Gault J cautioned against the taking of too punitive an approach to **costs** awards in such circumstances: '… without wishing unduly to fetter the wide discretion there must be in making costs awards so as to reflect time wasting or other conduct having the effect of increasing the costs of proceedings, we consider points fairly taken in good faith should not attract punitive awards merely because they might be categorized as "technical".'
[293] See, for example, the effect on calling irrelevant witnesses, discussed in Chapter 6.4.3.
[294] See *BFS Marketing Ltd v Field (No 2)* [1993] 2 ERNZ 325. Affirmed in *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305, 316 (CA).
[295] *Harris v Nurse Maude District Nursing Association (No 2)* [1991] 3 ERNZ 50.

Labour Relations Act 1987, where the Labour Court[296] awarded Mrs Harris compensation for what they described as 'the unjustified visitation upon her of very extensive humiliation, loss of dignity and hurt feelings'.[297] The Court considered that the severity of the accusations made against the applicant, and the fact that the applicant was successful on all aspects of her case,[298] meant that the case did not lend itself to the application of 'mathematical formula':[299]

> We find ourselves forced to rely heavily on our conception of what we consider to be an appropriate exercise of our jurisdiction in equity and good conscience, in the particular circumstances of this case… To us it would be grossly unfair and would offend against any principles of equity and good conscience if a substantial part of the compensation awarded to her had to be disbursed to meet her expenses.

The *Harris* case is good illustration of the depth and complexity of access to justice, which means more than simply access to the procedure and adequate monetary compensation. Mrs Harris brought her proceedings as much to protect her reputation as to gain financial recompense for the 'callous' manner of her dismissal.[300] In some cases damage to reputation may have been a reason for taking a case to litigation rather than reaching an early settlement, which was likely to have included a condition of confidentiality. As Judge Colgan said in *Binnie v Pacific Health:*[301]

> I accept there are cases, and this is one, where it is necessary and appropriate for a litigant to have his righteousness declared in a Court judgment. In some cases that may be all a litigant wants, requires and expects, and money is not to the point.

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[296] Mrs Harris was forced to take her case direct to the Labour Court, under the *Labour Relations Act* 1987, s 218 as the union had refused to represent her. The application for costs was made pursuant to s 283 of the *Labour Relations Act 1987.*

[297] *Harris v Nurse Maude District Nursing Association* [1991] 1 ERNZ 297, 313, Judge Castle.

[298] Ibid [1991] 3 ERNZ 50, 52.

[299] Ibid [1991] 3 ERNZ 50, 55.

[300] Ibid [1991] 1 ERNZ 297, 313.

[301] *Binnie v Pacific Health Ltd*, unreported, Judge Colgan, Employment Court, Auckland, AC10/02, 5 MarChapter 2002, para 33. The Court of Appeal reinforced this view in the subsequent appeal: '… Pacific Health insisted that any out-of-Court settlement should be kept confidential. That stance, as the Judge rightly found, forced Dr Binnie to litigate in order to mitigate the damage to his reputation which Pacific Health's conduct must have caused.' See *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, 442.

Judge Colgan pointed out the potential for costs awards to 'create another grievance'.[302]

> ...where success is non-monetary, it is important that the costs of obtaining that are not so prohibitive that they either preclude access to the Court or create another grievance for the employee for whom the consequences of a favourable judgment is significant financial loss or even ruin.

The Employment Court awarded Dr Binnie $80,000 costs and $12,868 disbursements. Despite these awards Dr Binnie incurred a further $60,000 for a successful defence of his treatment by his employer. In *Binnie* the Employment Court applied the principles set out by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*;[303] that 'party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred by the winning party.'[304] One other factor which the Employment Court took into account was that costs should 'not be disproportionate to the money value of the plaintiff's judgment.'[305]

On appeal, the Court of Appeal refused to take such an absolute approach, especially in a case where 'public vindication of reputation'[306] was an important factor and said that justice must be done to all concerned.[307] On a cross-appeal from Pacific Health, who had argued that they had been punished enough by an award against them for

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[302] Ibid 7.
[303] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).
[304] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, 442.
[305] *Binnie v Pacific Health Ltd* unreported, Judge Colgan, Employment Court, Auckland, AC10/02, 5 MarChapter 2002 para 26.
[306] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, 442.
[307] Ibid 446.

exemplary damages, the Court of Appeal held that costs were compensatory not punitive commenting that:[308]

> [Pacific Health's] submission misses the point that party and party costs are not punishment imposed on the losing party. They are a contribution to or reimbursement of the costs incurred by the winning party. They are thus entirely compensatory and not punitive at whatever level they are fixed.

The Court of Appeal also found that Dr Binnie's costs were reasonably incurred and ordered Pacific Health to pay 80 percent of them, a sum of $162,577.96 plus disbursements of $12,868.00.[309]

Although the figures discussed above were considerably larger than those likely to be awarded by the Employment Tribunal, the principles applied in determining the appropriate level of costs were also applicable in the Employment Tribunal situation.[310] Further, if a party was dissatisfied with the results of the Employment Tribunal hearing, *Binnie* is a good illustration of the costs which may have been involved in keeping a case alive and bringing it to a successful conclusion. Although an extreme example, it is submitted that the potential for this level of cost would have been, and remains, a huge barrier to access to justice.

8.2.3(D) EFFECT OF COSTS PRINCIPLES ON OUTCOMES

Compensation for humiliation, loss of dignity and injury to feelings was payable under s 40(1)(c)(i) of the *Employment Contracts Act 1991*, at the discretion of an Employment Tribunal adjudicator or an Employment Court Judge, if a personal grievance was established. Further, s 41(1) *Employment Contracts Act 1991* provided

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[308] Ibid 446–7.
[309] Ibid.
[310] Ibid.

for reimbursement of actual remuneration lost as a result of a personal grievance up to three months. This was not discretionary; although once loss of remuneration was established deductions could be made for contributory fault.[311] However, under s 41(2) additional compensation could be awarded at the discretion of the adjudicator.[312]

As discussed in Chapter Five, research into personal grievances heard in 1997 compensation levels were modest, averaging between $2,831 and $4,438, depending on the region.[313] Similar figures were quoted by Paul Stapp, a Member of the Employment Tribunal, who found that in 1997, 61 percent of compensation awards were under $5,000 and 90 percent were under $10,000.[314] Stapp said that when awarding compensation the Tribunal and Court had to find 'a middle road between compensation and a windfall, moderation and parsimony.'[315]

The main issue with both compensation and costs awards was that as this research and that of others has shown the compensation and costs awarded frequently did not meet the costs incurred by the parties during the personal grievance process. Despite having gone through the whole procedure of taking a personal grievance and having been 'successful', significant access to justice may have been diminished by the outcome, although this is a fairly subjective assessment. In a clearer example for instance, legal fees could be in excess of the costs awarded by the Employment Tribunal. Lorraine

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[311] *Employment Contracts Act 1991*, s 41(3).
[312] Ibid, s 41(2). See Chapter 2.4.4; Remedies.
[313] See Chapter 5.4.7 and Table 5.24.
[314] Paul Stapp, *The Employment Tribunal in 1998*, Paper to the New Zealand Law Society Employment Law Conference 1998, 146. See also Tony Couch, *Statistics and Comment*, Paper to the New Zealand Law Society Employment Law Conference 1998, 119.
[315] Paul Stapp, *The Employment Tribunal in 1998*, Paper to the New Zealand Law Society Employment Law Conference 1998, 146.

Skiffington recorded one senior adjudicator stating that the Employment Tribunal's role was to be conservative when awarding costs, and could not be expected to award full costs.[316]

According to Goddard CJ the principles distilled from the case law allowed a just outcome to be reached. He suggested:[317]

> This jurisprudence and practice generally results in an exercise of discretion that tempers justice with mercy by awarding the successful party a realistic amount for costs without mulcting the unsuccessful party in an amount that might, in that party's eyes, seem crippling or punitive.

However, although the adjudicator had the ability to consider the party's ability to pay when awarding costs, for many parties a significant cost was the first hurdle to overcome. It was possible that the risk of adverse costs would have prevented some of those with a reasonable case from taking the first leap.[318] Alternatively, this may have had a deterrent effect against unjustified litigation or may have caused a party to look at alternative methods to resolve a dispute, such as mediation,[319] which, as Harris pointed out, would have been 'more efficient and less costly to all involved, including the state.'[320] Hodges believed that the adverse costs rule provided an element of risk for parties taking legal action and may have encouraged them to consider early settlement.[321] These issues have been well illustrated in the previous section.

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[316] Lorraine Skiffington, 'The Employment Tribunal and Employment Court Three Years on …' (1994) 4 Employment Law Bulletin 55, 56.
[317] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38, 44–45, Goddard CJ.
[318] See Chapter 2.4.3(d) and Chapter 6.8 and Table 6.12 for impact of costs.
[319] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 300.
[320] Ibid.
[321] Christopher Hodges, 'Access to Justice with Conditional Fees' (1998) *New Law Journal* 917.

Zuckerman pointed has suggested that the fear of having to pay the opponent's costs was in itself a deterrent and an injustice, as the wealth of the parties concerned was the determining factor as to whether or not legal action was taken.[322] Further, those with the means to intimidate a poorer party by 'running a high-cost litigation strategy' may have coerced the poorer party into agreeing to an unfair settlement.[323]

Harris also suggests that the principle of costs following the event was too simplistic and did not 'give sufficient weight to the principle of access to justice.'[324] He advocated a more flexible approach to costs that did not 'shut out potential litigants because of legitimate fears about costs' awards which they will not be able to meet.'[325] However, it is arguable that the general principle that costs follow the event created a level of uncertainty between the parties. Lord Woolf believed that this type of approach to litigation usually resulted in 'total uncertainty for the parties as to what litigation will require and consequently the amount of expenditure in which they may be involved and the timescale of that involvement.'[326] The formulaic approach of the Court in awarding costs often resulted in successful parties being inadequately compensated for the costs incurred. This questioned the ability of the Court to provide a fair and just resolution.

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[322] A A S Zuckerman, 'A Reform of Civil Procedure – Rationing Procedure Rather than Access to Justice (1995) 22 JLS 155. Cited in A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change…' [1996] 59(6) *The Modern Law Review* 773, 778. 'This deterrent can itself be a source of injustice as it affects litigants in inverse proportion to their wealth.'
[323] Ibid 773, 778.
[324] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 299.
[325] Ibid 282, 300.
[326] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System* (June 1995) ch 3, 10.

Self-represented parties could have been at a disadvantage in terms of adverse cost awards as without representation they would be less able to assess the risks involved. This was suggested by Goddard CJ in *Reid v New Zealand Fire Service Commission*[327] where he opined that the self-represented applicant 'may not have fully appreciated from the start the perils to which failure could expose him.'[328] In *Reid* the applicant had, however, been warned early that his case had little merit and that he faced potentially higher costs if he persisted with his claim. Goddard CJ, further in *Reid*, said that '[a]pprehension of an order for costs effectively enough deters most people from going unnecessarily to law.'[329] While this statement may have been accurate the fear of potential costs awards against them was objectively also likely to have prevented some parties with legitimate claims from taking legal action.

In some cases as Harris suggests, the applicant might have been 'prevented by the court at the threshold from proceeding with the litigation' if the opposing party made an application for security for costs.[330] This could happen if either party suspected that the other would not be able to pay if an adverse costs award was made against them. If security for costs could not be provided, the court could stay the proceedings.[331] Again, those on middle incomes were most vulnerable to pressure from the possibility

[327] *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38.
[328] Ibid [1995] 2 ERNZ 38, 39, Goddard CJ.
[329] Ibid [1995] 2 ERNZ 38.
[330] B V Harris, 'Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile' [1995] NZLRev 282, 298.
[331] Ibid.

of an adverse costs award as they neither qualified for legal aid nor had the disposable income to pay large costs awards.[332]

The principles applied in the awarding of costs could have a profound effect on the outcome of a case. There have been cases where the Court has awarded full indemnity costs, or close to it, against the respondent[333] because of their conduct during the personal grievance procedure. One example of the Court's approach in such cases was *Harris v Nurse Maude* where Gault J ruled that:[334]

> …counsel for the first respondent… must bear some responsibility for the intransigent approach of his client from the time of the suspension of Mrs Harris, when he had become actively and personally involved in the whole matter, as evidenced by the fact that it was he who composed and forwarded to solicitors then acting for Mrs Harris (and not to her) the notice of dismissal and the somewhat broad and certainly unspecific reasons for it.
>
> The hearing was unnecessarily prolonged by the first respondent seeking to have the leave question determined in the middle of the hearing, despite having agreed at the outset to hear the leave and grievance matters together.

Conversely, and more dangerously in terms of fair access to justice, there have been cases where the behaviour of the party's representative has affected an award of costs. In *Martin v Browning* the appellants alleged, among other things, adjudicator bias against their advocate in the Tribunal.[335] The Employment Court noted that the advocate had been 'unduly abrasive in his dealings with the respondent's solicitor', making outbursts including 'some quite extraordinary and intemperate utterances that the adjudicator was obliged to deal with and did so in a remarkably restrained

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[332] Ibid. See Chapter 5.4.8(a).
[333] The Court in *NZALPA v Registrar of Unions* [1989] 2 NZILR 550 pointed to the possibility of an award amounting to a total indemnity of costs and expenses. Subsequent to that case there was a judgment for full indemnity, namely *NZ Railways Corporation v NZ Seamens Union IUOW* [1989] 2 NZILR 613, where admittedly the case was exceptional in many respects.
[334] *Harris v Nurse Maude District Nursing Association (No 2)* [1991] (3) ERNZ 50, 52.
[335] *Martin v Browning* [2003] 2 ERNZ 416.

fashion.'[336] This ground of the challenge was dismissed, the Court finding not only no disclosure of bias but 'judicial tolerance of an excessively technical but erroneous approach to the case by the Martins' advocate.'[337] In the Employment Tribunal the advocate's conduct had been taken into account in awarding costs and disbursements of $4,500 to the applicant. Counsel for the applicant had submitted that the advocate's conduct in particular had:[338]

> ...significantly contributed unnecessarily to the costs of litigation by repeated failure to progress matters leading up to trial and failure to comply with orders of the Tribunal and belated attempts to seek disclosure in the course of the proceedings and arguing the point after the applicants had presented their case.

The Employment Tribunal had found that the advocate had 'employed tactics showing "contempt not only to ordinary and accepted standard of procedure but also towards follow [sic] practitioners and the Tribunal alike."'[339] As a result of the advocate's behaviour, despite 'winning' most substantive points on appeal in the Employment Court, no order for costs in the Tribunal was made with Colgan J ruling that:[340]

> The Tribunal's orders for costs must be modified to reflect these outcomes on appeal. Although the Martins should have been substantially successful in the Tribunal, any award of costs must take account of the manner of the conduct of their case by their advocate. I have already referred to the advocacy of the Martin's case at the hearing. As the Tribunal noted, also, the advocate adopted a "trial by ambush" strategy in relation to relevant documents and simply refused to comply with an order for disclosure and inspection of documents made by the Tribunal, presumably in an attempt to advance his clients' case. In these circumstances considerations of equity and good conscience dictate that no award of costs should be made for the case in the tribunal.

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[336] Ibid 421, Judge Colgan.
[337] Ibid.
[338] Ibid.
[339] Ibid, 426, Judge Colgan, quoting the Employment Tribunal judgment.
[340] Ibid 432.

It is submitted that in such cases the client was at the mercy of their representative. Access to justice could therefore be denied by the very person hired to facilitate it.

Levels of compensation awarded could also be affected by the applicant's remuneration level and position in the employment hierarchy. Ian McAndrew, in a survey of the Employment Tribunal in 1999, found a clear correlation between levels of compensation for hurt and humiliation under s 40(1)(c)(i) *Employment Contracts Act 1991* and grievants' occupation.[341] He found that applicants who were managers, professionals, supervisors or administrators were more likely to have been awarded more than $5000 in compensation than other occupational groups.[342]

Data collected for this research has shown that employees occupying the professional and management occupational classes sought the highest levels of compensation but did not receive a great deal more than the next highest group (farm and trades).[343] Length of service and seniority may have been factors which contributed to this outcome.

Access to justice may also have been affected by gender because of the link in the awarding of compensation for humiliation and injury to feelings by the Employment Tribunal and the apparent tendency to award higher compensation based upon the applicant's level of income.[344] Caroline Morris, in her research into gender bias in the employment institutions, argued that any practice that linked compensation to the

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[341] Ian McAndrew, 'Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation' (1999) 24(3) NZJIR 365, 373.
[342] Ibid.
[343] See Chapter 5.4.7 and Table 5.26.
[344] Ibid. See also Caroline Morris, 'An Investigation into Gender Bias in the Employment Institutions' (1995) 21(1) NZJIR 67, 75.

employee's loss of opportunity to work at that job meant that women would have received lower awards as their average income was usually lower.[345]

The research for this thesis found similar results to those of Morris and additional possible explanations. In Chapter Five it was shown that although women tended to have a higher success rate in establishing their personal grievances, men tended to seek much higher compensation. Men were awarded slightly higher levels of compensation than women but received a lower proportion of what they sought.[346] This was despite adjudicators saying that they did not take gender into account when calculating compensation awards.[347]

Morris argued that the emphasis should have been on the impact of the employer's actions on the grievant and the level of distress caused. Although this has been acknowledged by the court, Morris nevertheless, identified a 'pattern of differing valuations of the hurt suffered by men and women' over the four years of her research.[348] She gave a number of examples of cases where the Employment Tribunal found a high level of injury to feelings in the case of a woman but recognised it with a lesser award than that given in a case of a lower level of distress by a man.[349]

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[345] Caroline Morris, 'An Investigation into Gender Bias in the Employment Institutions' (1996) 21, NZJIR 67, 75. See *Cain v HL Parker Trusts* [1992] 3 ERNZ 777, 788, Goddard CJ: 'Normally the first head for which compensation is awarded is the loss of opportunity to work at the job of which the employee has been held to have been unjustifiably deprived.'

[346] See Chapter 5.4.6 and Table 5.15.

[347] Ibid. When asked this question, four adjudicators said no, two said 'not consciously' and two said that they would in certain circumstances.

[348] *Cain v HL Parker Trusts* [1992] 3 ERNZ 777, 788, Goddard CJ: 'The compensation must be commensurate with the grievance suffered.' See Caroline Morris, 'An Investigation into Gender Bias in the Employment Institutions' (1996) 21(1) NZJIR 67, 77.

[349] Compare, for example, the levels of compensation awarded to men and women in: *Van Leeuwen v Skedden* [1994] 1 ERNZ 624; *Prebble v Coastline FM* [1992] 1 ERNZ 52; *Baussmann v Trilogy Business Systems Ltd* [1992] 1 ERNZ 386; *Harding v Challenge Real Estate* [1992] 1ERNZ 546; *L v M*

A similar pattern of gender bias was observed by Wendy Davis in sexual harassment cases, where she found that awards of compensation under s 40(1)(c)(i) for men dismissed for sexual harassment tended to be higher than those paid to women who were sexually harassed.[350]

8.3 Personal Grievance Procedures of the *Employment Contracts Act 1991*: Implications and Conclusions

The issues raised by use of the adjudication system under the *Employment Contracts Act 1991* relate to questions such as whether Government objectives had been met, standards of representation, effectiveness of outcomes, and how these factors affected access to justice for participants. This thesis found that the operation of the *Employment Contracts Act 1991* did not effectively implement the aims and objects of the Government at the time, nor of the Act itself. There were lengthy delays, both in waiting for a hearing and a subsequent decision, representation was costly and on occasion contributed to such delays. Further, a combination of factors meant that the Employment Tribunal procedure was formal and, to many parties, legalistic. Indeed, where remedies were awarded, including costs, these were often lower than what was sought. Despite the best intentions of Parliament at the time, the reality for participants was a cumbersome personal grievance system that in fact created barriers to rather than access to justice.

[2004] 1 ERNZ 123; *Davidson v Christchurch Civic Crèche* [1995] 1 ERNZ 172. See, Caroline Morris, 'An Investigation into Gender Bias in the Employment Institutions' (1995) 21(1) NZJIR 67, 76–78.

[350] Wendy Davis, *A Feminist Perspective on Sexual harassment in Employment Law in New Zealand*, New Zealand Institute of Industrial Relations Research (1994) 41.

8.3.1 *EMPLOYMENT RELATIONS ACT 2000*: A NEW APPROACH

The Labour Coalition Government introduced the *Employment Relations Act 2000* with the intention of reforming the labour market, with the main focus being on building productive employment relationships and the promotion of principles of good faith in those employment relationships.[351] This implemented Government policy to repeal the *Employment Contracts Act 1991* and 'introduce a better framework for the conduct of employment relations.'[352] The preamble to the Employment Relations Bill 2000 stated that the new framework was 'based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual, economic exchange.'[353] This contrasts markedly with the main object of the *Employment Contracts Act 1991*, which was 'to promote an efficient labour market.'[354]

To emphasise the change of philosophy between the *Employment Contracts Act 1991* and the *Employment Relations Act 2000*, it is worth reproducing part of the explanatory note to the Employment Relations Bill:[355]

> The overarching objective of the Employment Relations [Act] is therefore to build productive employment relationships through the promotion of mutual trust and confidence in *all* aspects of the employment environment. The employment environment encompasses the entire complex and dynamic system of relationships. It includes all participants, not just employers and employees. In order to achieve this primary purpose, the [Act] specifically:
>
> - recognises that employment relationships must be built on good faith behaviour; and
> - acknowledges and addressees the inherent inequality of bargaining power in employment relationships; and

[351] *Employment Relations Act 2000*, s 3. The *Employment Relations Act 2000* was enacted in August 2000 and came into force on 2 October 2000.
[352] Employment Relations Bill 2000, preamble.
[353] Ibid.
[354] Ibid.
[355] Employment Relations Bill 2000, explanatory note, emphasis added.

- promotes collective bargaining; and
- protects the integrity of individual choice; and
- promotes mediation as the primary problem-resolving mechanism; and
- reduces the need for judicial intervention.

These principles are reflected in the objects section of the *Employment Relations Act 2000*, s 3. The principles of good faith, and the parties to whom they apply, are contained in s 4 of the *Employment Relations Act 2000*. Thus, parties to an employment relationship 'must deal with each other in good faith'. This also includes a requirement that the parties must not directly or indirectly mislead or deceive each other.[356] This duty of good faith is wider than the implied mutual obligations of trust and confidence found at common law[357] and requires parties to be 'responsive and communicative' in actively maintaining a productive employment relationship.[358]

The good faith obligations and emphasis on employment relationships in the *Employment Relations Act 2000* are a new and significant change. In comparison, the *Employment Contracts Act 1991* had no equivalent provisions for parties to act in good faith toward each other. Instead, the implied term as to mutual trust and confidence was applied by the Court to individual personal grievance cases.[359]

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[356] *Employment Relations Act 2000*, s 4(1)(a)-(b). Thus, '[g]ood faith has more to do with notions of honesty, frankness, and what lawyers call "bona fides" rather than adherence to strict legal rules': *National Distribution Union Inc v Carter Holt Harvey Ltd* [2001] ERNZ 822, 841.
[357] Ibid, s 4(1A)(a). See Anderson, G, Hughes, J, Leggatt, M, Roth, P, *Employment Law Guide* (7th ed, 2005) 83. This 2004 amendment extended the duty to observe good faith from the original, where in the context of individual employment agreements, good faith obligations were restricted by the Court of Appeal to the common law meaning: *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533.
[358] *Employment Relationship Act 2000* s 4(1A)(b). See Anderson, G, Hughes, J, Leggatt, M, Roth, P, *Employment Law Guide* (7th ed, 2005) 86.
[359] Ibid 83.

8.3.2 *EMPLOYMENT RELATIONS ACT 2000*: IMPLICATIONS FOR PERSONAL GRIEVANCE PROCEDURES

In general terms, the *Employment Relations Act 2000* makes some progress towards addressing the concerns raised in this thesis about the adjudication process under the *Employment Contracts Act 1991*. This section examines relevant changes under the *Employment Relations Act 2000* and how these address the issues raised by the *Employment Contracts Act 1991* as identified by this thesis. The section concludes with a summary of the changes proposed to personal grievances procedures and the role of institutions under the *Employment Relations Act 2000* as signalled by the current National Coalition Government.

a) Institutions

One of the principal changes under the *Employment Relations Act 2000* was the specialist institutional arrangements. Part 10 of the Act establishes the new institutions, which are mediation services, the Employment Relations Authority, and the Employment Court. Consistently with the new philosophy under the *Employment Relations Act 2000*, the object of Part 10 is to establish procedures and institutions that:[360]

- support successful employment relationships and the good faith obligations that underpin them; and
- recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves; and
- recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships; and
- recognise that the procedures for problem-solving need to be flexible; and

[360] *Employment Relations Act 2000,* s 143.

- recognise that there will always be some cases that require judicial intervention; and
- recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
- recognise that difficult issues of law will need to be determined by higher Courts.

Interestingly, the objects in s 143 *Employment Relations Act 2000* are not significantly different to those contained in the equivalent s 76 of the *Employment Contracts Act 1991*. Section 76 aimed to provide appropriate services to facilitate the mutual resolution of differences between parties to employment contracts, and to establish a 'low level, informal, specialist Employment Tribunal to provide speedy, fair, and just resolution of differences between parties to employment contracts.' This research has shown that the objects provisions under s 76 were not strictly met. The question outstanding at the introduction of the new legislation was whether the institutions created under the *Employment Relations Act 2000* would be more successful in meeting their stated objectives.

Paul Roth notes that the background papers to the *Employment Relations Act 2000* emphasised the importance of resolving employment relations problems swiftly and lowering costs by reducing legalism and the need for formal adjudication.[361] The Act achieves these objects in a number of ways:[362]

- The new legislation separated mediation from adjudication and emphasised speedy, informal mediation as a prerequisite *before* further action could be taken in most cases;
- The first stage adjudication level in the new Employment Relations Authority was stripped of many of the procedural complexities that had existed under the former Employment Tribunal framework;
- A variety of direct and indirect disincentives to seeking legal assistance were introduced. In particular, there would be less need for workers to consult lawyers with the promotion of

[361] P Roth, 'Recent Institutional Developments in Employment Law' [2005] ELB 37.
[362] Ibid, emphasis added.

> unionism. Moreover, legal aid was no longer available for the mediation stage (since it was no longer carried out by a formal Tribunal), and procedure in the Authority was generally rendered less legalistic.

This illustrates the ways in which institutions under the *Employment Relations Act 2000* are able to support parties in employment relationships. While the objects provisions under both pieces of legislation appear similar, the emphasis has altered considerably. Parties are encouraged to resolve employment relationship problems themselves, with the provision of expert assistance when required. If this is unsuccessful, the matter may be referred to the Employment Relations Authority for a speedy and non-adversarial investigation.[363] The Employment Court remains as a more formal method of resolving outstanding issues in a traditional, adversarial manner.

8.3.2(A) MEDIATION

Section 144(1) of the *Employment Relations Act 2000* directs the chief executive of the Department of Labour to 'provide mediation services to support all employment relationships.' The functions of the mediation services are therefore separate from the investigatory body, the Employment Relations Authority. This contrasts with the provisions of the *Employment Contracts Act 1991* where both mediation and adjudication services were provided by the Employment Tribunal. Employment Tribunal members were statutory officers and a considerable number held dual warrants, which meant they were able to mediate *and* adjudicate. In contrast, mediators under the *Employment Relations Act 2000* are now employees of the Department of Labour, and are therefore subject to the direction of the chief

[363] *Employment Relations Act 2000*, s 157.

executive.[364] The result of this change is that, as employees of the Department of Labour, mediators now operate in a more flexible environment and are therefore able to work in a less prescriptive manner.[365] This is further enhanced by s 147 *Employment Relations Act 2000*, which empowers mediators to decide what services are appropriate in the particular circumstances in each case.[366]

The provision of mediation services is not now strictly limited to face-to-face mediation, but extends services to include the provision of:[367]

- information about employment rights and obligations;
- information about services available;
- other services that assist the smooth conduct of employment relationships; and
- other services that assist persons to resolve, promptly and effectively, their employment relationship problems.[368]

The inclusion of these services is intended to reduce the reliance on legalism and to facilitate early dispute resolution. This helps to prevent employment relationship problems from being resolved in the more time-consuming, and expensive processes of the Employment Relations Authority or Employment Court.[369]

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[364] *Employment Relations Act 2000*, s 145.
[365] Anderson, G, Hughes, J, Leggatt, M, Roth, P, *Employment Law Guide* (7th ed, 2005) 1016.
[366] *Employment Relations Act 2000*, s 147(1).
[367] Ibid, s 144(2).
[368] 'Resolve' in this context takes the meaning found in the Concise Oxford Dictionary, 10th edition, 'to settle or find a solution to.' The full Employment Court in *Jesudhass v Just Hotel Ltd* 21/3/06, unreported, Employment Court, Wellington, Colgan CJ. Shaw and Couch JJ, 21 MarChapter 2006, WC3/06) [45] goes on to note that '[i]t does not simply mean to bring matters to an end, but requires a conclusion in the sense of a mutually agreed settlement or solution.'
[369] Anderson, G, Hughes, J, Leggatt, M, Roth, P, *Employment Law Guide* (7th ed, 2005) 1016.

A major shift in this employment relationship problem resolution process is that mediation is now 'obligatory under the Act in all but exceptional circumstances.'[370] These are defined in the Act as situations where the Authority considers that the use of mediation would be futile, contrary to the public interest, or in matters of urgency.[371] In this way, mediation is now 'encouraged' as an option of first resort:[372]

> The creation of a service focussed solely on mediation with a separate Employment Relations Authority reflects one of the core philosophies of the *Employment Relations Act* – that employment relationships are more likely to be effective if problems are resolved by the parties themselves.

Confidentiality in mediation is an important mechanism to encourage effective participation in mediation.[373] Again, the intention underlying the confidentiality provisions in the *Employment Relations Act 2000* is to enhance the informality and effectiveness of the mediation services.[374] These provisions prevent the disclosure of information presented at mediation except where parties consent to disclosure. This legislative requirement ensures that confidentiality in mediation is maintained. This contrasts with the situation under the *Employment Contracts Act 1991*, where although mediation was privileged, this was not a statutory requirement. While Employment Tribunal members treated information in mediation with confidentiality,

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[370] A Dumbleton, 'The Employment Relations Authority Gets Under Way' (2001) 26 NZJIR 119. See *Employment Relations Act 2000*, s 159(1)(b), which requires the Employment Relations Authority to direct parties to mediation before the Authority investigates, with some exceptions.
[371] Ibid.
[372] M Quivooy, 'Employment Relations Service mediation – statistics and analysis' [2006] ELB 45.
[373] P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ER148.04.
[374] *Employment Relations Act 2000*, s 148.

it was possible for written statements to be obtained by discovery and in limited circumstances admissible in subsequent adjudication.[375]

A strict interpretation of the confidentiality provisions in s 148 *Employment Relations Act 2000* is that participants in mediation have liberty to make statements with little or no consequences. Judge Colgan in *Shepherd v Glenview Electrical Services*[376] observed that the combined effects of s 148 are 'clear, absolute and draconian.'[377] He considered that this appeared to make inadmissible 'offences that may be committed by one person making a statement to another for the purposes of the mediation.'[378] While Judge Colgan expressed reservations over this strict interpretation of the confidentiality provisions, an alternative approach was not put forward until the later case of *Jesudhass v Just Hotel Ltd*.[379] In this case, the full Employment Court considered the phrase 'made for the purposes of the mediation.'[380] It was held that where information provided during mediation, was not given for the legitimate purposes of mediation, that information would not attract the protections of confidentiality and inadmissibility.[381] To obtain the protection of confidentiality,

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[375] See *Crummer v Benchmark Building Supplies Ltd* [2000] 2 ERNZ 22 and P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ER148.04.
[376] *Shepherd v Glenview Electrical Services Ltd* [2004] 2 ERNZ 118.
[377] Ibid, para 46.
[378] Ibid. Judge Colgan found this strict interpretation unconstructive: 'While mediation confidentiality and even evidential inadmissibility are desirable in many, even most, cases, I am concerned that the draconian effects of s 148(3) may have the unintended consequence of dissuading parties from settling in, or even entering into, mediation, if the conduct of their opponents in that forum is beyond the reach of the law in any practical way.'
[379] *Jesudhass v Just Hotel Ltd* 21/3/06, unreported, Employment Court, Wellington, Colgan CJ, Shaw and Couch JJ, 21 MarChapter 2006, WC3/06.
[380] This phrase is found at *Employment Relations Act 2000*, s 148(1).
[381] As an alternative ground for its decision, the Court held that a decision unilaterally to terminate an employment agreement must, if proved, have been intended to have effect outside the mediation process and therefore exists outside that process. Such a decision would therefore come within the exception to confidentiality recognised under s 148(6)(a).

communications must be given in a genuine effort to 'settle existing or potential litigation, such as admissions of liability or offers to settle.'[382]

However, on appeal, the Court of Appeal overturned the Employment Court decision and held, *inter alia*, that s 148(1) of the *Employment Relations Act 2000* 'should be construed as applying to all documents prepared for use in or in connection with a mediation and to all statements or submissions made at a mediation (or a record thereof), unless they have come into existence independently of the mediation'.[383] However, the Court of Appeal considered that in some circumstances, such as involving serious criminal offending during mediation, public policy considerations may dictate that such conduct would not be caught by s 148(1) of the *Employment Relations Act 2000* but declined to rule on this point within the context of the appeal.[384]

The emphasis on the provision on mediation services under the *Employment Relations Act 2000* appears to have a high level of success. Over 80% of cases that go to mediation are resolved, withdrawn, or settled.[385] Goddard CJ observes this high level of settlement at mediation, noting that many cases do not reach the Employment Relations Authority at all. Of the cases that do reach the Authority, 'reportedly half are settled by further mediation or otherwise by consent.'[386] The higher use of mediation and informal methods of settlement means that more cases are being

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[382] G J Wood, 'Mediation – an Employment Relations Authority Perspective" [2006] ELB 46, 63. See also S Robson, 'Recent Case Comment' [2006] ELB 67.
[383] *Just Hotel Limited v Jesudhass* [2007] NZCA 582 (14 December 2007) 44.
[384] Ibid 43.
[385] M Quivooy, 'Employment Relations Service mediation – statistics and analysis' [2006] ELB 45
[386] T G Goddard CJ, 'Farewell from the Chief Judge: Reflections on 15 Years in Office' [2005] ELB 31, 34.

resolved outside the investigative Authority and more formal Court settings. Costs are lower as mediation is provided by the mediation services free of charge, and the greater emphasis on parties resolving disputes themselves results in more swift resolution of employment relationship problems.

8.3.2(B) THE EMPLOYMENT RELATIONS AUTHORITY

The Employment Relations Authority was established under the *Employment Relations Act 2000* to investigate employment problems in a speedy and non-adversarial way.[387] The Employment Relations Authority is a specialist low level investigatory body intended to operate independently of and from the mediation service but both are administered through the Department of Labour. The current requisite qualifications to serve as a Member of the Employment Relations Authority did not alter from those equivalent to serve as a Member of the Employment Tribunal. There are no specific requirements for membership of the Employment Relations Authority, nor what constitutes relevant experience and/or background to serve as a Member. For example, Members are not required to be lawyers. Section 157 of the *Employment Relations Act 2000* describes the role of the Authority:

- the Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, *without regard to technicalities*;
- the Authority must, in carrying out its role, comply with the principles of natural justice, aim to promote good faith behaviour, support successful employment relationships, and generally further the objects of the Employment Relations Act; and
- the Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with the Act or with the relevant employment agreement.

[387] 'Explanatory Note to the Employment Relations Bill' [2000] ELB 40, 43.

The Employment Relations Authority is intended to function as an efficient and informal means of resolving legal issues at first instance.[388] The Employment Relations Authority uses an investigative process, with an emphasis on fact-finding at its own initiative. It can therefore act in a speedy and less formal and legalistic manner. It achieves this in several ways:[389]

- *Mediation*: Importantly, the Employment Relations Authority can direct parties to use mediation services as it sees fit, even in a case where mediation has already taken place.[390]

- *Investigative Powers*: The Employment Relations Authority has wide investigative powers, and is not strictly bound by the rules of evidence or by the parties' description of the problem.[391] Wide discretion is afforded, enabling a process that is informal and flexible to meet the circumstances of particular employment relations problems. The Employment Relations Authority's investigatory powers are set out in s 160(1) of the *Employment Relations Act 2000*. The Authority may, in investigating any matter:[392]

    - call for evidence *and information* from the parties or from any other person;

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[388] *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt* Harvey [2002] 1 ERNZ 74, para 13. See Anderson, G, Hughes, J, Leggatt, M, Roth, P, *Employment Law Guide* (7th ed, 2005) 1036.
[389] Anderson, G, Hughes, J, Leggatt, M, Roth, P, *Employment Law Guide* (7th ed, 2005) 1036.
[390] *Employment Relations Act 2000*, s 159(1)(c).
[391] P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ER160.
[392] *Employment Relations Act 2000*, s 160(1). These powers are supplemented by the provisions of Schedule 2, which includes:
- Parties' right to representation;
- Right of the Employment Relations Authority to summon witnesses and pay their expenses;
- Power to take evidence on oath;
- Power to prohibit publication of evidence, pleadings, names, and settlements;
- Power to award interest on any matter involving the recovery of money;
- Power to award costs.

- require the parties or any other person to attend an investigation meeting to give evidence;
- interview any of the parties or any person at any time before, during, or after an investigation meeting;
- in the course of an investigation meeting, fully examine any witness;
- decide that an investigation meeting should not be in public or should not be open to certain persons; and
- follow whatever procedure the Authority considers appropriate.

A good example of the Employment Relations Authority's move away from more formal legal procedures is its power to call for evidence *and information*, irrespective of the legal nature of the evidence.[393] It can therefore receive information that is not properly evidence subject to equity and good conscience, natural justice, and the requirement to do nothing inconsistent with the *Employment Relations Act 2000*:[394]

- *Natural justice requirements*: Whilst fulfilling its functions, the Employment Relations Authority must act in a manner that complies with the principles of natural justice and act reasonably taking into account its investigative functions.[395] This requires that consideration be given to the circumstances of each case, allowing adaptable and flexible procedures in a manner that is fair to both parties.[396] Indeed, as Wilson et al note, from the perspective of the average employee or employer who brings a problem to the Employment Relations Authority, natural justice 'is, surely, simply being given a fair

[393] P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ER160.07.
[394] *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186, para 21.
[395] *Employment Relations Act 2000*, s 173(1)(a) & (b).
[396] For a discussion of the principles of natural justice in the Employment Relations Authority, see *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186, para 58–69. See also K Beck, K Toogood, and J Wilson , *Investigations in the Employment Relations Authority – It's Not a Court, Get Over It!* Paper to the New Zealand Law Society Employment Law Conference 2004, 207, 209.

hearing.'[397] The article goes on to observe three components to this requirement:[398]

- Every party has the right to present their case in whatever way is appropriate and accessible to them;
- Each party must have knowledge of all evidence and information put forward by the other party and be given the opportunity to reply;
- The Employment Relations Authority Member must determine the case without fear or favour in an independent manner.

Thus, the investigation is a process, not an event; it is for the benefit of the parties, aimed at providing an informed decision that is understood by both parties, without undue cost.[399]

- *Reduced formality in recording determinations*: Section 174 *Employment Relations Act 2000* places limitations on the matters that must be covered by the Employment Relations Authority's determinations; the purpose of which is to create speedy, informal, and practical justice.[400] The Employment Relations Authority is therefore not, unlike the Employment Tribunal, a court of record.[401]

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[397] K Beck, K Toogood, and J Wilson, *Investigations in the Employment Relations Authority – It's Not a Court, Get Over It!* Paper to the New Zealand Law Society Employment Law Conference 2004, 207, 209.
[398] Ibid.
[399] Ibid 210.
[400] The Authority must: state relevant findings of fact; state and explain its findings on relevant issues of law; express its conclusions on matters required to conclude the matter; and specify orders made. The Authority need not: record all or any of the evidence heard or received; record or summarise any submissions; indicate reasons for findings as to credibility; or record the process followed in investigating and determining the matter.
[401] The Employment Tribunal was required by the Employment Court to fully state the reasons for its decisions: *Smith v Armourguard Security Ltd* [1993] 1 ERNZ 446. See also G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 1067.

8.3.2(c) NATURAL JUSTICE AND CROSS-EXAMINATION

The Employment Relations Authority did not, in direct contrast to the Employment Tribunal, initially encourage cross-examination by either party or their representatives. A Practice Note issued by the Chief of the Authority advised that once evidence had been presented, the Employment Relations Authority Member could ask further questions of the witness.[402] Cross-examination was not permitted by opposite parties or their representatives, although they were able to request further investigation in relation to the evidence heard.[403] However, this practice was challenged in the *David* case, where the Employment Court found that the right to cross-examine was intrinsic to natural justice at 'every hearing at which a party wishes to exercise that right'.[404] Although the Court did acknowledge the decision might cause some delay, in the Court's view it would only cause slight disruption.

The Government's response to the *David* case was to introduce amending legislation to the requirements that the Employment Relations Authority comply with the principles of natural justice.[405] The new legislation does not require the Employment Relations Authority to allow the cross-examination of a party or person, but 'the

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[402] Practice Note, 6 November 2000. See [2000] ELB 165.
[403] Ibid. For an example of the Employment Relations Authority process in relation to questioning witnesses, see N Taylor, 'The Employment Relations Authority Investigation Process' [2001] ELB 19, 20–1.
[404] *David v Employment Relations Authority* [2001] 1 ERNZ 354, para 2. Credibility of witnesses was a central feature of this case, which could not properly be assessed without cross-examination. See GDS Taylor, 'An ERA of Cross-Examination' [2001] ELB 136.
[405] *Employment Relations Authority*, ss 157(2A) & 173(1A). These subsections were inserted on 14 November 2001 *Employment Relations (Validation of Union Registration and Other Matters) Amendment Act 2001*.

Authority may, in its absolute discretion, permit such cross-examination.'[406] Goddard CJ, in a subsequent case notes:[407]

> In cases where credibility is in issue, there can in theory still be a tension between the rule that the Authority need not permit cross-examination and the rule that the Authority must afford natural justice. Anecdotally, I understand that, in cases such as *David*, cross-examination is routinely permitted.

8.3.3 JUDICIAL OVERSIGHT OF THE EMPLOYMENT RELATIONS AUTHORITY

The processes of the Employment Relations Authority are insulated from outside scrutiny by legislative limitations on the Employment Court's jurisdiction to intervene. For example, it is not the function of the Employment Court to advise or direct the Employment Relations Authority on the exercise of its investigative role, powers and jurisdiction, or the procedure it follows or intends to follow.[408] In addition, there is limited scope for judicial review of matters before the Employment Relations Authority.[409] Thus, the Employment Court no longer has a supervisory role over the lower forum.[410] Instead, the emphasis is on resolving the employment relationship problem in a 'speedy, effective, and non-legalistic' manner rather than how the institutions deal with that problem.[411]

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[406] *Employment Relations Authority*, s 157(2A).
[407] *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186, para 58.
[408] *Employment Relations Act 2000*, ss 179(5) and 188(4)(a) & (b). For a comparison of differences between the Employment Court under the *Employment Contracts Act 1991* and *Employment Relations Act 2000*, see TG Goddard, 'The changed role of the Employment Court under the Employment Relations Act 2000' [2000] ELB 115.
[409] *Employment Relations Act 2000*, s 184(1A). For a discussion on this see P Roth, 'Recent institutional developments in employment law' [2005] ELB 37, 39–40.
[410] See P Churchman and P Roth, *Employment Relations Act 2000* New Zealand Law Society Seminar (October 2000) 68.
[411] Explanatory note to Employment Relations Amendment Bill (No 2) 2004, 7. See P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ER179.04A. For a discussion on the jurisdiction of the Employment Relations Authority and the Employment Court, see *Axiom Rolle PRP Valuations Services Ltd v Kapadia*, Employment Court, Auckland (AC43/06; ARC79/04).

8.3.4 *DE NOVO* HEARINGS IN THE EMPLOYMENT COURT

Under the *Employment Relations Act 2000*, parties to a personal grievance may seek a hearing *de novo* of their case in the Employment Court.[412] Thus, the whole case may be heard afresh by the Court; it is not an appeal process restricted to points of law, but an original proceeding.[413] This strongly contrasts with the *Employment Contracts Act 1991*, where parties had to be certain that all relevant evidence and information was placed before the Employment Tribunal as no new evidence was permitted on appeal.[414] Consequently, a great deal of irrelevant or excess evidence was placed before the Employment Tribunal. However, under the *Employment Relations Act 2000*, a challenge to a determination of the Employment Relations Authority is not restricted to matters that have already been placed before the lower forum. In other words, any case appearing before the Court in a *de novo* hearing may involve any new evidence or information that is relevant to the claim.[415]

8.3.5 PERSONAL GRIEVANCES: DEFINITION AND PROCESS

In relation to the definitions of personal grievances, there has been little change with the passing of the *Employment Relations Act 2000*. The most notable changes that have been made, as discussed above, relate to the institutions that resolve personal

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[412] *Employment Relations Authority*, s 179(3)(b).

[413] See *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 and *Coutts Cars Ltd v Baguley* [2001] ERNZ 660; [2002] 2 NZLR 533 (CA). See also P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ER179.04. In supporting the specialist role of the Employment Court, the New Zealand Law Commission notes that employment relationships are not simply a variation of other commercial relationships, and a hearing *de novo* cannot sensibly be compared to an appeal: New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, No. 85, MarChapter 2004, para 277–284.

[414] *Employment Contracts Act 1991*, s 95. Parties could apply to the Court for leave to introduce other issues, explanations and facts. See G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 1080.

[415] However, under *Employment Relations Act 2000*, s 182(2)(b), it should be noted that a *de novo* hearing is not available if the plaintiff had not participated in the Employment Relations Authority's investigation in a manner designed to resolve the issues: *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] 1 ERNZ 157.

grievances and the procedures used. The definitions of personal grievances themselves have altered little. This section highlights some changes relevant to this thesis.

In a significant jurisdictional departure, *Employment Relations Act 2000* s 113(1) confines personal grievance actions challenging a dismissal to be the sole first instance prerogative of the Employment Relations Authority. This abolishes the previously available right to bring a common law action for wrongful dismissal in other civil courts. The effect of this section ensures all actions for dismissal are now heard by the Employment Relations Authority; actions challenging a dismissal by way of wrongful dismissal, breach of contract, or under the *Contractual Remedies Act 1977* are no longer permissible.[416] This covers *any* aspect of the dismissal, for any reason, in any court.[417] Provided it is not centred upon a dismissal, the residual common law action for breach of contract however, remains available as an alternative to a disadvantage action.[418]

The definition of a personal grievance, *Employment Relations Act 2000*, s 103 is largely modelled on its predecessor, *Employment Contracts Act 1991*, s 27. The exceptions being that a disadvantage grievance in s 103(1)(b) is expanded to include '…any condition that survives termination of the employment' and 'during employment that has since been terminated.' Section 103(1)(e) also introduces a new

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[416] G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 834.
[417] *Employment Relations Act 2000*, s 113(1).
[418] However, it is to be noted that both the Employment Relations Authority and Employment Court have jurisdiction on actions in breach of an employment agreement: *Employment Relations Act 2000*, ss 16(1)(b), 187(1)(a), & 162. Further, in any matter related to an employment agreement the Authority and the Employment Court has the same jurisdiction as the District and High Courts concerning laws relating to contracts but no tort jurisdiction: *Brookers Personal Grievances* para 19.1.

category of personal grievance 'that the employee has been racially harassed in the employee's employment'.

The most significant recent change to the determination of personal grievances effected by the *Employment Relations Amendment Act (No 2) 2004*, is the passage of section 103A; an objective 'Test of Justification' applicable to both dismissal and disadvantage claims. Section 103A provides:

> … the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's action , and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Judicial determination of how this has shifted the law away from that under previous legislation has yet to fully evolve beyond the Employment Court.[419] Shaw J, in *Hudson*, applied an objective test: what would a fair and reasonable employer do in the circumstances? On the face of it, this widens the Court's enquiry, enabling a subjective decision by the employer to be tested against a universal objective standard of the hypothetical fair and reasonable employer in light of all relevant circumstances. Coupled with the good faith requirements, s 103A can be read as giving stronger emphasis on the employer's inquiry, addressing any concerns of inherent inequalities between the parties.[420]

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[419] *Air New Zealand v Hudson*, 30 May 2006, AC30/06, Shaw J. Just how far the law has moved is a controversial issue, see W Hodge, 'Section 103A Objectivity and Justification for Dismissal' Employment Law Conference (October 2006) 173–181.

[420] *Air New Zealand v Hudson* (30 May 2006, AC30/06, Shaw J). This covers *all* aspects of the employment relationship and the varying contexts in which they arise: *Fuiava v Air New Zealand* (12 September 2006 EC AC51/06); and applies to *all* personal grievances, including redundancy: *Simpsons Farms Ltd v Aberhart* (EC ARC13/06 Judge Colgan). In addition, the evolving s 4 good faith provision of the *Employment Relations Act 2000* and its 2004 (No2) amendment Act's extended reach has impacted upon all personal grievance contexts including redundancy dismissals. For a discussion on justification, see T Cleary, 'What would a fair and reasonable employer have done?' [2006] ELB 85.

Categories of personal grievance have also undergone some changes under the *Employment Relations Act 2000* including:

- **Section 104 Discrimination** is extended to include union activities and section 105 now fully incorporates the prohibited discrimination grounds contained in the *Human Rights Act 1993.* These extended grounds are: disability, age, political opinion, employment status and sexual orientation. In addition, s 107 defines what union activity constitutes.
- **Section 108 Sexual Harassment** largely mirrors its *Employment Contracts Act 1991* s 29 counterpart except visual material of a sexual nature is introduced to maintain consistency with the *Human Rights Act 1993*.[421] A further amendment states 'either by its nature or through repetition has a detrimental effect', whereas the corresponding *Employment Contracts Act 1991* s 29(1)(b) appeared to have no requirement for detriment to follow on from repeated behaviour.[422]
- **Section 109 Racial Harassment** is a new provision with no counterpart in the *Employment Contracts Act 1991*, which provides a definition of racial harassment in employment relationships, and is therefore subject to the same remedies as other personal grievances.

8.3.6 Continuation of the 'Ninety Day Rule' for Personal Grievances under the *Employment Relations Act 2000*

Under the *Employment Contracts Act 1991* s 33, any employee submitting a personal grievance was required notify the employer within 90 days of the action that allegedly amounted to a personal grievance. This requirement has been continued under *Employment Relations Act* s 114, albeit with significant changes in wording. One distinction is s 114 replacing the term 'submit' with 'raise'; that is, an employee 'who wishes to raise a personal grievance must… raise the grievance with his or her

[421] *Employment Relations Act 2000*, s 108(1)(b)(ii).
[422] Ibid, s 108(1)(b)(iii).

employer within the period of 90 days…'[423] However, this appears to have made little practical difference on the issue of notifying the employer of the existence of a personal grievance.[424]

As under the *Employment Contracts Act 1991*, the 90-day rule may be set aside and a personal grievance commenced if the delay was occasioned by exceptional circumstances.[425] In a departure from the previous legislation, *Employment Relations Act 2000* s 115 now lists circumstances that constitute 'exceptional circumstances' These include:[426]

> (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
>
> (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
>
> (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
>
> (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

Although on the face of it, the rule relating to exceptional circumstances appears to have been broadened – such as matters that can now be regarded as exceptional circumstances – the courts have continued the strict approach used under the *Employment Contracts Act 1991*. Indeed, the Court in *Morgan* commented that:[427]

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[423] *Employment Relations Act 2000*, s 114(1). For clarity, s 114(2) sets out the requirements an employee must follow to successfully raise a personal grievance: see *Creedy v Commissioner of Police* (23 May 2006, Colgan CJ, AC29/06) para 36.
[424] G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 837.
[425] *Employment Relations Act 2000*, s 114(4)(a), c.f. *Employment Contracts Act 1991*, s 33(4)(a).
[426] *Employment Relations Act 2000*, s 115.
[427] *Telecom New Zealand Ltd v Morgan* (2004) 7 NZELC 97, 544 para 22. This case relied in particular on s 115(a), where the defendant's trauma was deemed insufficient to meet the requirements of

'[i]f anything, it is arguable that Parliament has made the "exceptional circumstances" test a more difficult one…' Further, Colgan CJ notes that it is well settled that Parliament did not intend to relax the test for extending the 90-day time limit, but sought to exemplify, but not limit, situations that would amount to exceptional circumstances.[428] The application of the exceptional circumstances remains a matter of judicial discretion according to the facts of each case:[429]

> Above all, the question of whether an application for leave such as this should be granted is a matter of the Court's discretion. Although relevant considerations have been established for the exercise of this discretion, these only apply as the circumstances of each case allow.

8.3.7 PERSONAL GRIEVANCES: REMEDIES

Section 123 of the *Employment Relations Act 2000* re-enacts the remedies provisions of *Employment Contracts Act 1991* s 40 with some changes. Again it provides for three main remedies: reimbursement for wages or other money lost;[430] compensation for humiliation, loss of dignity, and injury to feelings;[431] and reinstatement.[432] However, reinstatement has now become the primary remedy, whereas under the *Employment Contracts Act 1991* it was rarely used.[433] Where there is a personal grievance and reinstatement is sought, the Employment Relations Authority must

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exceptional circumstances. Followed in *Creedy v Commissioner of Police* (23 May 2006, Colgan CJ, AC29/06.

[428] *Bryson v Three Foot Six Ltd* Employment Court, Wellington (WC17/06; WRC8/06), para 39. See also *Creedy v Commissioner of Police* (Employment Court, Auckland AC 29/06, 23 May 2006 Colgan CJ), where Colgan CJ notes that the further provisions of s 115 operate as illustrations of the circumstances that could justify the exercise of the discretion to grant leave but they are not exclusive. For a comparison of the different approaches to the facts in both these cases, see S Robson, 'Recent Case Comment' [2006] ELB 97.

[429] Ibid, para 16.

[430] *Employment Relations Act 2000*, s 123(b).

[431] Ibid, s 123(c)(i).

[432] Ibid, s 123(a).

[433] While reinstatement has become the primary remedy in legislation, it remains an option rarely used at litigation; it is more likely to be used earlier in the process: see G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 875.

provide for reinstatement wherever practicable.[434] In addition, the Employment Relations Authority can now make determinations ordering interim reinstatement under *Employment Relations Act* s 127.[435]

The provisions for reimbursement remain largely unchanged under *Employment Relations Act 2000*, s 128. There are some minor changes of wording, which do not appear to substantially alter the provision.[436]

The provisions in relation to compensation for humiliation, loss of dignity, an injury to feelings are unchanged under *Employment Relations Act 2000*, s 123(c)(i). However, the quantum of awards remains controversial. As found in this research, the amount of compensation awarded was often low; therefore compromising the justice of a finding that a personal grievance existed. Such criticism has continued under the *Employment Relations Act 2000*, and is a topic recently addressed by the Courts.[437] The Court of Appeal re-examined the principles and policy of compensation in *Telecom New Zealand Ltd v Nutter*.[438] It was held that there is no automatic right for the full amount of compensation claimed as there is no statutory direction in this respect.[439] Instead, the Court stated policy considerations as to why moderation in awards is appropriate:[440]

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[434] *Employment Relations Act 2000*, s 125(2). See *Goodman Fielder New Zealand Ltd v Ali* (Employment Court, Auckland AC 38A/03, 19 June 2003).
[435] *Employment Relations Act 2000*, s 161(p). See *Cliff v Air New Zealand Ltd* [2005] 1 ERNZ 1.
[436] G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 882.
[437] M Leggat, 'Compensatory Payments: Some Observations and Thoughts for Change' [2003] ELB 41. This article also discusses Goddard CJ's criticisms of compensation levels.
[438] *Telecom New Zealand Ltd v Nutter* (2004) 7 NZELC 97, 563.
[439] Ibid, para 81. This can be contrasted with Goddard CJ's approach in *Trotter v Telecom Corporation of New Zealand Ltd* [1993] ERNZ 659, which held that compensation must be awarded in the absence of a good reason to the contrary.
[440] *Telecom New Zealand Ltd v Nutter* (2004) 7 NZELC 97, 563, para 79.

1. The discretionary nature of the remedy is obviously inconsistent with any principle requiring "full" compensation to be awarded.

2. The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.

3. Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).

4. Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes, although cf the comments made by Cooke P in *Bailey v Minister of Education* [1993] 2 ERNZ 321 at 324 distinguishing between "rules of thumb" and "principles".

5. A community expectation of "full" compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation.

A further ground for reducing compensation awarded is when the personal grievance is granted on procedural grounds only.[441] For example, the Court of Appeal reduced a compensation award by 75% where, had the employer followed the correct process, the employee would have been justifiably dismissed.[442]

A later case, *NCR (NZ) Corporation v Blowes*, addresses the specific issue of awards for non-economic loss.[443] Wild J commented in this case that awards for non-economic loss are in part matters of impression and discretion, within recognised parameters. Applying a case law analysis, he then identified what those parameters currently are; canvassing the range of awards commonly awarded for compensation for non-economic loss. Wild J then observed that the upper end of the permissible

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[441] *Ioane v Waitakere City Council (No. 2)* [2005] 2 NZELR 537.
[442] Ibid. See T Cleary, 'Compensation under section 123 Employment Relations Act 2000' [2005] ELB 151: 'In a jurisdiction governed by equity and good conscience compensation payable should always be reduced by a percentage to take into account the likelihood that the employee would have been fairly dismissed if due process had been followed. This, in effect, is the mirror image of s 124 – reduction of remedies due to contributory fault. If a dismissal was near certain or certain notwithstanding serious deficiencies in process then little or no compensation for actual loss of employment is payable. This includes amounts for both economic and non-economic loss.'
[443] *NCR (NZ) Corporation v Blowes* [2005] 1 ERNZ 932.

range for compensation now lies at $27,000.[444] Cleary provides a useful commentary on this and other cases, observing that '$10,000 is by no means the floor for serious grievances with $7,000 considered something like the outer limit for even quite insensitive treatment.'[445] These cases demonstrate the importance the Court places on consistency with current and past practice and will adjust any awards accordingly.[446] This is reflected in studies undertaken by McAndrew that show no clear patterns of difference between levels of compensation awards under the *Employment Contracts Act 1991* and the *Employment Relations Act 2000*.[447] It should be noted that contributory fault currently reflects the past practice of the courts, and applies to all remedies including reinstatement.[448]

8.3.8 COSTS

The power of the Employment Relations Authority to award costs is found in *Employment Relations Act 2000*, sch 2, cl 15. It is in all material respects similar to the power of the Employment Tribunal to award costs in the *Employment Contracts Act 1991*, s 98.[449] There is wide discretion to award costs as the Employment

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[444] Success rates and levels of remedies awarded by the Employment Relations Authority and the Employment Court are made available by the Employment Relations Service at http://www.erx.dol.govt.nz. Wild J used these statistics in bringing the award for compensation in this case into line with other awards for compensation.

[445] T Cleary, 'Compensation under section 123 Employment Relations Act 2000' [2005] ELB 151.

[446] G Anderson, J Hughes, M Leggatt, and P Roth, *Employment Law Guide* (7th ed, 2005) 861. However, Colgan CJ questions the Court of Appeal, citing an absence of a statutory cap; identifies cases where substantial awards for non-economic loss are granted; and notes that only a small minority of cases proceed to the Employment Relations Authority and beyond, and general levels of compensation often exceed the sorts of levels examined by the Court of Appeal: *Simpsons Farm Ltd v Aberhart* (Employment Court ARC13/06 Colgan CJ).

[447] I McAndrew, 'Determinations of the Employment Relations Authority' (2002) 27 NZJIR 323, 333.

[448] *Employment Relations Act 2000*, s 124, which replaces *Employment Contracts Act 1991*, ss 40(2) & 41(3).

[449] P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ERSch2.15.04.

Relations Authority 'thinks reasonable' or 'as it thinks fit'.[450] For the first three years, the Employment Relations Authority exercised this discretion in line with decisions made under previous employment legislation when apportioning costs.[451] However, the Employment Relations Authority decided to focus more on its unique investigative role in determining applications for costs, thus distinguishing case law developed under an adversarial system.[452]

This issue of whether the Employment Relations Authority was bound by decisions made under previous legislation was considered by the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.[453] This case held that because of the unique nature of the Authority, parties should not have the same expectations of the award of costs that might be expected of the Court.[454] The Court went on to distinguish the approach used in quantifying the award of costs, commenting that the costs principles applied by the Employment Relations Authority are 'not necessarily as comprehensive or as prescriptive' as those applied previously.[455] The Employment Relations Authority sets its own procedures, and this is reflected in its approach to costs:[456]

- There is a discretion as to whether costs would be awarded and what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.

---

[450] *Employment Relations Act 2000*, Schedule 2, cl 15(1) & (2).
[451] P Bartlett, W C Hodge, P Muir, C Toogood, and R Wilson, *Brookers Employment Law* (2006) ERSch2.15.04.
[452] *Graham v Airways Corp of NZ Ltd* (28/1/04, A Dumbleton, AA39/04), para 7.
[453] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.
[454] Ibid.
[455] Ibid, para 44.
[456] Ibid, emphasis added.

- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.
- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That *awards will be modest*.
- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Under its investigative role, the Employment Relations Authority can now take a more flexible approach when determining the (modest) level of costs to be awarded.

8.4 CONCLUSIONS

8.4.1 THE QUESTION POSED

This thesis examined the operation of the Employment Tribunal, what peoples' experiences were in using it, and the efficacy of the system. The thesis concludes that people had mixed experiences with the operation of the Employment Tribunal with many being frustrated and dissatisfied with a number of aspects of its actual operation.

8.4.2 OBJECTS

The question of whether the system worked well must be measured against the objects of the *Employment Contracts Act 1991* which described the Employment Tribunal as 'a low level, informal, specialist Employment Tribunal to provide speedy, fair, and

just resolution of differences between parties…'[457] Adopting this yardstick, the thesis found that:

- The expressed ideal of the Employment Tribunal being low level was a misnomer as the process imposed by the Employment Court and the *Employment Tribunal Regulations 1991* tended to be complex and it, over time, adopted an increasingly legalist approach.

- The notion of informality was largely illusory with most participants in the thesis survey finding the process and operation of the Employment Tribunal to be Court like, sometimes intimidating and too formal in nature. Generally the thesis cannot conclude that the Employment Tribunal was particularly user-friendly, although it is acknowledged that the low response rate means that more satisfied parties might have not bothered to return their completed questionnaires.

- In contrast to conciliation councils formed under the *Labour Relations Act 1987* where no reasoned decisions were published, the Employment Tribunal has built up a body of transparent, consistent precedent based case law.[458] This evidently fulfilled the intent of the legislation in creating a specialist Employment Tribunal.

- On the issue of providing speedy resolution of personal grievances the Employment Tribunal performed poorly. A significant number of participants surveyed in this thesis from both employee and employer perspectives complained of the negative impact of delay in obtaining an

[457] *Employment Contracts Act 1991*, s 76(b).
[458] *Labour Relations Act 1987*, s 253(2)(1)(a).

initial hearing and in the processing and issuing of decisions and although there might have been bias among this group, the length of time from notification to hearings suggests this was more widely experienced.

- On the question of the provision of 'just' outcomes, it was, given the highly subjective nature of such an ideal, difficult to conclude if the *Employment Contracts Act 1991* delivered. Participants' satisfaction levels were variable with many employee applicants taking the view that they were happy to secure a resolution in their favour without being thrilled by the level of remedies awarded. In contrast, some employers took a dim view of the level of remedies. The 1997 case data suggests that many applicants were likely to perceive compensation as low and costs in engaging with the process high.

8.4.3 Overall, did the system work well?

Given the level and variety of criticism of many aspects of the adjudication system under the *Employment Contracts Act 1991* it is difficult to conclude that it worked well for all participants. Those who were comfortable utilising the adjudication system included counsel and experienced advocates who arguably benefited by entry to an increasingly complex and specialist area of the law which had previously not been their preserve; with its attendant income opportunities.

Some adjudicators also expressed frustration around delay and lack of resourcing and the failure of parties to initially utilise low level dispute resolution mechanisms such as mediation. Adjudicators also bemoaned the complexity and legalism introduced by

the *Employment Contracts Act 1991*'s emphasis on stricter contractual law principles and the legal manoeuvres adopted by counsel.

8.4.4 ACCESS TO JUSTICE

A central theme of this thesis has been to determine whether users could easily access a method of resolving personal grievances which was universal and not prohibitively costly. For the first time, all employees and not just union members had access to a personal grievance procedure.[459] The thesis identified a number of barriers for those with limited income being able to access the personal grievance procedure which was seen as not easily negotiable without obtaining costly specialist advice and representation. The extension of personal grievance access to non union members whilst laudable, also led to greater pressure on resources than anticipated.

8.4.5 *EMPLOYMENT RELATIONS ACT 2000* – A SAVIOUR?

Whilst it was beyond the scope of this thesis to do a detailed comparison of participants' experience under both acts it was evident that the *Employment Relations Act 2000* has addressed a number of systemic shortcomings of the *Employment Contracts Act 1991* by, amongst other things:

- Placing greater legislative emphasis and additional resources at the 'front end' of the system to encourage the option of mediation as a first step resolution process and allowing the Employment Relations Authority adjudicators to direct mediation at their discretion.[460]

[459] *Employment Contracts Act 1991*, s 27(1).
[460] *Employment Relations Act 2000*, s 159.

- Encouraging emphasis upon preserving employment 'relationships' and making reinstatement a primary remedy.[461]
- Introducing a requirement of 'good faith' behaviour in the resolution of differences and the specification of an objective approach to assessing dismissals and disadvantage actions.[462]
- Creating a successor to the Employment Tribunal (the Employment Relations Authority) that is less formal and more flexible in procedure thus freeing up adjudicators to resolve disputes using appropriate strategies.
- Utilisation of an investigatory approach for the Employment Relations Authority which encourages a move away from formal adversarial proceedings and a model that provides adjudicators with a more interventionist role; thus cutting down the need for protracted legal submissions and overuse of legal counsel and consequently containing costs for both applicant and respondent.
- An expanded jurisdiction of the Employment Relations Authority including the hearing of interim reinstatement disputes.
- The option of a *de novo* hearing in the Employment Court if a party is dissatisfied with a decision of the Employment Relations Authority.

It is evident that the *Employment Relations Act 2000* is not the end of history in terms of employment law and any discussion of the implications of reform to personal

[461] Ibid, s 125.
[462] Ibid, ss 4 and 103A.

grievance processes would not be complete without a brief consideration of proposed amendments to the *Employment Relations Act 2000* signalled by the new National Coalition Government. In the lead up to the 2008 General Election, the National Party policy clearly signalled an intention to amend the *Employment Relations Act 2000* in relation to, amongst other things, personal grievances.

In December 2008, the National Coalition Government amended the *Employment Relations Act 2000*[463] to enable, from 1 March 2009, an employer and a new employee to agree to a ninety calendar day trial period without recourse to a personal grievance for unjustifiable dismissal if the employment was terminated prior to the expiry of a ninety calendar day period.[464] Details of other proposed reforms to the *Employment Relations Act 2000*'s personal grievances machinery were initially sketchy but have recently been more precisely articulated by the Hon. Kate Wilkinson, Minister of Labour for the National Government.[465] The Government proposes to ensure that the Mediation Service is properly resourced and staffed with properly qualified mediators.[466] In respect of the Employment Relation Authority, the Government intends that this body act in a more judicial manner which may include the recording of its proceedings and automatic access to cross-examination of witnesses.[467] Further, recent advertisements for expressions of interest for appointment to the Employment Relations Authority clearly demonstrate a preference

[463] *Employment Relations Amendment Act 2008*.
[464] *Employment Relations Act 2000*, s 67.
[465] Hon. Kate Wilkinson, Speech to the 23rd Annual Primer Industrial Relations Conference, 4 March 2009, Auckland. Available at: www.national.org.nz/Article.aspx?Articled=29470.
[466] Ibid.
[467] Ibid.

for applicants holding legal qualifications.[468] It seems reasonable to conclude in light of the above that the National Coalition Government seeks a more formal and legalistic structured process to resolve personal grievances.

To judge whether or not the *Employment Relations Act 2000* provides better access to justice for parties to personal grievance requires a detailed study adopting a similar methodology to that which this thesis applied to the *Employment Contract Act 1991*. In addition, any such study would need to be cognizant of any proposed or actual amendments by the National Coalition Government to the *Employment Relations Act 2000*'s personal grievance machinery provisions and to the role of the Mediation Service and the Employment Relations Authority in dealing with personal grievances.

[468] 'Vacancies for Employment Relations Authority Members', Workplace Services, Department of Labour, New Zealand Government, October 2009.

APPENDIX I

DATABASE CATEGORIES

Main Database

1. Reference Number
2. Additional Reference Number
3. Jurisdiction
4. Cause of Action (codes)
5. Additional Cause of Action (codes)
6. Applicant (name)
7. Number of Applicants
8. Occupation of Applicant (text)
9. Gender of Applicants (codes)
10. Adjudicator (name)
11. Date of Hearing
12. Length of Hearing
13. Type of Representative (applicant)
14. Type of Representative (respondent)
15. Type of Decision (Sub or costs)
16. Did mediation occur (yes/no)
17. Date Personal Grievance Occurred
18. Remedies Sought (codes)
19. Remedies Granted (codes)
20. Amended Cause of Action (codes)
21. Appeal Sought (yes/no)
22. Applicant C&D sought (codes)
23. Respondent C&D Sought (codes)
24. Applicant C&D Granted (codes)
25. Respondent C&D Granted (codes)
26. Disbursement Sought (code)
27. Disbursements Granted (codes)
28. Procedural Issues (text)

Breakdown of Causes and Remedies

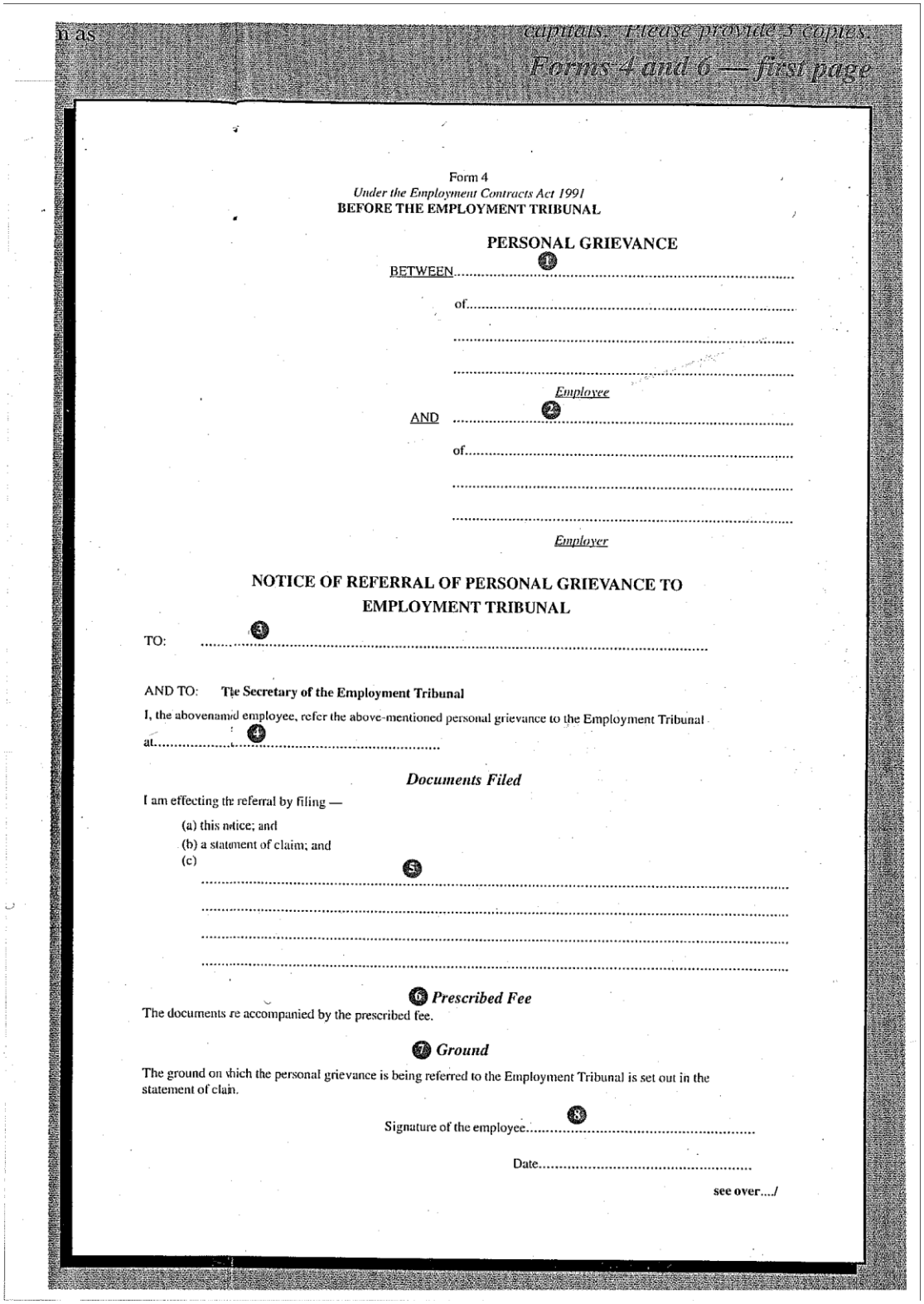
1	Reference Number
2	Cause of Action
3	Additional Cause of Action
4	Inappropriate Cause of Action
5	Remedies Sought Pecuniary
6	Remedies Sought Other
7	Inappropriate Remedies Sought
8	Remedies Granted Pecuniary
9	Remedies Granted Other
10	Wages Claimed to Date of Hearing (dollar amount)
11	Weeks
12	Granted – Wages to Hearing
13	Future Loss/Loss of Benefit Claimed (dollar amount)
14	Period
15	Granted – Future Loss
16	Weeks/Months
17	Total Earnings Sought
18	Total Earnings Granted
19	Remedies Sought – Injury to Feelings (dollar amount)
20	Remedies Granted – Injury to Feelings (dollar amount)
21	Contributory Fault (yes/no)
22	Percentage Reduction (percentage figure)
23	Comments (text)

Costs and Disbursements Sought and Granted

1	Reference Number
2	Type of Action
3	Actual Costs, Applicant
4	Applicant Costs Sought
5	Applicant Costs Granted
6	Applicant Disbursements Sought
7	Applicant Disbursements Granted
8	Actual Costs, Respondent
9	Respondent Costs Sought
10	Respondent Costs Granted
11	Respondent Disbursements Sought
12	Respondent Disbursements Granted
13	Legal Aid (yes/no)
14	Total Sought (costs and disbursements)
15	Total Granted
16	Comments

APPENDIX II

EMPLOYMENT TRIBUNAL AND EMPLOYMENT RELATIONS AUTHORITY FORMS



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capitals. Please provide 3 copies.

Forms 4 and 6 — first page

Form 4

Under the Employment Contracts Act 1991

BEFORE THE EMPLOYMENT TRIBUNAL

PERSONAL GRIEVANCE

BETWEEN (1) .....

of.....

.....

.....

Employee

AND (2) .....

of.....

.....

.....

Employer

NOTICE OF REFERRAL OF PERSONAL GRIEVANCE TO EMPLOYMENT TRIBUNAL

TO: (3) .....

AND TO: **The Secretary of the Employment Tribunal**

I, the abovenamed employee, refer the above-mentioned personal grievance to the Employment Tribunal at (4) .....

Documents Filed

I am effecting the referral by filing —

(a) this notice; and

(b) a statement of claim; and

(c) (5) .....

.....

.....

.....

.....

(6) ***Prescribed Fee***

The documents are accompanied by the prescribed fee.

(7) ***Ground***

The ground on which the personal grievance is being referred to the Employment Tribunal is set out in the statement of claim.

Signature of the employee (8) .....

Date.....

see over..../

9 *Notice to the Employer*

Notice of Intention to Defend

If you intend to defend the proceedings, you **must** —

(a) **within 10 clear days** after the date of the service of this notice on you, file a notice of intention to defend

with the Secretary of the Employment Tribunal at .....and;

(b) **without delay**, serve one copy of the notice of the intention to defend on the employee.

Mediation or Adjudication

You will be notified of the place, date and time of the mediation or adjudication in respect of the personal grievance.

Date..... 10 .....

Secretary of the Employment Tribunal

This notice of referral is filed by: .....

11

.....

[on behalf of the abovenamed applicant*], whose address for service is:

.....

.....

and whose telephone number is.....and whose fax number is .....

***Cross out if this does not apply.**

you are

Form 5 — first page

Form 5

Under the Employment Contracts Act 1991

BEFORE THE EMPLOYMENT TRIBUNAL

.....

.....

1

.....

BETWEEN .....

of .....

2

.....

.....

Applicant

AND .....

of .....

3

.....

.....

Respondent

STATEMENT OF CLAIM

[Contents of Statement of Claim

The matters required by Regulation 32 of the Employment Tribunal Regulations 1991 must be specified by the applicant in the space provided below. The last paragraph of the statement of claim must state whether the applicant believes that the proceedings can be settled by mediation].

.....

4

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Form 5 — second page

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4

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.....

.....

.....

.....

.....

[continue on another page if necessary]

Dated the .....day of.....19.....

5

.....

Applicant

This notice is filed by.....

6

.....

[on behalf of the abovenamed applicant*], whose address for service is:

.....

.....

and whose telephone number is.....and whose fax number is.....

***Cross out if this does not apply.**

Form 13
Under the Employment Contracts Act 1991
BEFORE THE EMPLOYMENT TRIBUNAL

NOTICE OF INTENTION TO DEFEND

.....

.....

1 .....

BETWEEN.....

of.....

2 .....

.....

Applicant

AND.....

of.....

3 .....

.....

Respondent

TO: 4 .....

AND TO: **The Secretary of the Employment Tribunal**

TAKE NOTICE that I intend to defend the above-mentioned proceedings. 5

I consider that the above-mentioned proceedings should be dealt with by mediation [adjudication*]

Signature of Respondent 6 .....

Date.....

This notice is filed by.....

7 .....

[on behalf of the abovenamed applicant*], whose address for service is:

.....

.....

and whose telephone number is.....and whose fax number is.....

***Cross out if this does not apply.**

Form 1 rr 5, 6

Application to Employment Relations Authority

Section 158, Employment Relations Act 2000

Between

Full name of applicant: .....
Address of applicant: .....

and

Full name of respondent: .....
Address of respondent: .....

To the Employment Relations Authority
And to the respondent

Statement of problem (*or* matter)

1 The problem (*or* matter) that I wish the Authority to resolve is:[1]

.....
.....

2 The facts that have given rise to the problem (*or* matter) are:[1]

.....
.....
.....

(32r) 2000 p. 1362

SCHEDULE 1 Forms list. **REFER:** *R. 6(1) of 2004/423. This list has been amended by adding the following item:—*

"Form 8 Notice accompanying application served outside New Zealand".

who is seeking, by this application, an order, under section 127(1) of the Employment Relations Act 2000, for the employee's interim reinstatement, the applicant must, at the time of lodging this application, file a signed undertaking in form 2.

Form 1—*continued*

4 I attach copies of the following documents (which I think are relevant to the problem):[3]

.....

.....

.....

[3] List here **all** the documents that are attached, eg, your employment agreement or letters that you wish to rely on, or documents required under any other legislation, etc.

Mediation

5 Have you, the applicant, tried to resolve this problem (*or* matter) by using mediation services provided by the Department of Labour? Yes ☐ No ☐

6 Have you, the applicant, tried to resolve this problem (*or* matter) by using mediation provided by someone other than the Department of Labour? Yes ☐ No ☐

7 Have you, the applicant, taken any other steps of any kind to resolve the problem (*or* matter)? Yes ☐ No ☐

If the answer to this question is "Yes", specify the other steps taken:

.....

.....

8 If you, the applicant, have answered "No" to both the question in paragraph 5 and the question in paragraph 6, please indicate why you have not used mediation to try to resolve the problem (*or* matter):

.....

.....

Fee

9 This application is accompanied by the prescribed fee.

Signature of applicant: .....

Date: .....

Form 1—*continued*

Notice to the respondent

1 If you intend to respond to this application, you must, within 14 days after the date of the service of this application on you, lodge 2 copies of a statement in reply with an officer of the Employment Relations Authority at [*location*].

2 The term **days** (in paragraph 1 of this notice) does not include any day in the period beginning with 25 December in any year and ending with 5 January in the following year.

3 You will be notified of the place, date, and time at which the Authority will conduct any investigation meeting in respect of this application.

Officer of the Employment Relations Authority: .....
Date: .....

This application is lodged by ....., whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange number for service is ..... and whose e-mail address for service is .....[4]

or

This application is lodged by ....., on behalf of the abovenamed applicant, whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange number for service is ..... and whose e-mail address for service is .....[4]

[4] Although a full postal address must always be supplied, the supply of a telephone number and the supply for service of any 1 or more of the following, namely, a fax number, a document exchange number, or an e-mail address are optional.

Form 3 r 8

Statement in reply

Under the Employment Relations Act 2000

Between

Full name of applicant: .....

Address of applicant: .....

and

Full name of respondent: .....

Address of respondent: .....

To the applicant

And to the Employment Relations Authority

1 The respondent's view in relation to the problem (*or* matter) specified in the application is:[1]

.....

.....

2 The respondent's account of the relevant facts is:[1]

.....

.....

.....

.....

.....

.....

3 The respondent makes the following comments and supplies the following further information:[1]

.....

.....

.....

[1] Give enough detail to ensure that the Authority and the applicant are fully, fairly, and clearly informed.

4 I attach copies of the following documents (which I think are relevant to the problem (*or* matter)):[2]

.....

.....

.....

[2] List here **all** the documents that are attached, eg, your employment agreement or letters that you wish to rely on, or documents required under any other legislation, etc.

Form 3—*continued*

Mediation

5 Have you, the respondent, tried to resolve this problem (*or* matter) by using mediation services provided by the Department of Labour? Yes ☐ No ☐

6 Have you, the respondent, tried to resolve this problem (*or* matter) by using mediation provided by someone other than the Department of Labour? Yes ☐ No ☐

7 Have you, the respondent, taken any other steps of any kind to resolve the problem (*or* matter)? Yes ☐ No ☐

If the answer to this question is "Yes", specify the other steps taken:

.....

.....

8 If you, the respondent, have answered "No" to both the question in paragraph 5 and the question in paragraph 6, please indicate why you have not used mediation to try to resolve the problem (*or* matter):

.....

.....

Signature of respondent: .....
Date: .....

This statement in reply is lodged by ....., whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange number for service is ..... and whose e-mail address for service is .....[3]

or

This statement in reply is lodged by ....., on behalf of the abovenamed respondent, whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange number for service is ..... and whose e-mail address for service is .....[3]

[3] Although a full postal address must always be supplied, the supply of a telephone number and the supply for service of any 1 or more of the following, namely, a fax number, a document exchange number, or an e-mail address are optional.

Form 4

r 10

Application for investigation to be reopened

Schedule 2, clause 4, Employment Relations Act 2000

Between

Full name of applicant: .....
Address of applicant: .....

and

Full name of respondent: .....
Address of respondent: .....

To the respondent (*or* the applicant)
And to the Employment Relations Authority

I apply to the Employment Relations Authority at [*location*] for the reopening of the investigation to which the Authority's determination (*or* order) of [*date*] relates.

The file number of the Authority's determination (*or* order) is .....

A copy of the Authority's determination (*or* order) is attached to this application.

Grounds

This application is made on the following grounds: [*State fully but concisely the grounds on which the application is made.*]

.....
.....
.....
.....

Fee

This application is accompanied by the prescribed fee.

Signature of applicant (*or* respondent): .....
Date: .....

Form 4—*continued*

Notice to the respondent (or *the applicant*)

1 If you intend to oppose the application for the reopening of the investigation, you must, within 14 days after the date of the service of this notice on you, lodge 2 copies of a statement in reply with an officer of the Employment Relations Authority at [*location*].

2 The term **days** (in paragraph 1 of this notice) does not include any day in the period beginning with 25 December in any year and ending with 5 January in the following year.

3 You will be notified of the place, date, and time at which this application will be considered.

Officer of the Employment Relations Authority: .....
Date: .....

This application for an investigation to be reopened is lodged by ....., whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange number for service is ..... and whose e-mail address for service is .....[1]

or

This application for an investigation to be reopened is lodged by ....., on behalf of the abovenamed applicant (*or* the abovenamed respondent), whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange number for service is ..... and whose e-mail address for service is .....[1]

[1] Although a full postal address must always be supplied, the supply of a telephone number and the supply for service of any 1 or more of the following, namely, a fax number, a document exchange number, or an e-mail address are optional.

Form 6

r 21

Notice of investigation meeting

Under the Employment Relations Act 2000

File no: .....

Between

Full name of applicant: .....
Address of applicant: .....

and

Full name of respondent: .....
Address of respondent: .....

To the applicant
And to the respondent

Take notice that the Employment Relations Authority will hold an investigation meeting in relation to the matter of [*insert description of matter*] at [*address*] on [*date*] at [*time*].

Officer of the Employment Relations Authority: .....
Date: .....

Notes

1 If the applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the applicant.

2 If the respondent does not attend the investigation meeting, the Authority may, without obtaining any further information in relation to the problem (*or* matter), issue a determination in favour of the applicant.

3 If in doubt, please contact an officer of the Employment Relations Authority immediately.

r 22

Form 7
Witness summons

Schedule 2, clause 5, Employment Relations Act 2000

Between

Full name of applicant: .....
Address of applicant: .....

and

Full name of respondent: .....
Address of respondent: .....

To [*name*], of [*address*]

You are required to attend before the Employment Relations Authority at [*location*] on [*date*] at [*time*] and from then until you are no longer required to attend, to give evidence in relation to a matter before the Authority.

And you are ordered to bring with you and produce at the same time and place [*set out details of the books, papers, documents, records, or things, in the person's possession or under the person's control, to be produced*].

This summons is issued by the Employment Relations Authority at [*location*] on the application of [*full name*], the [*state the party, ie, applicant, respondent, etc*], under the seal of the Employment Relations Authority at [*place*] on [*date*].

or

This summons is issued by the Employment Relations Authority at [*location*], of its own volition, under the seal of the Employment Relations Authority at [*place*] on [*date*].

Officer of the Employment Relations Authority: .....

APPENDIX III

QUESTIONS FOR TRIAL INTERVIEW FOR EMPLOYMENT TRIBUNAL ADJUDICATORS

1 PROCESS

1.1 How would you describe the process? Formal? Informal? Legalistic?

1.2 Have the intentions of the ECA been met, i.e. a 'quick, informal, inexpensive process'?

1.3 Are you aware of instances where parties seeking adjudication file incorrect documents?

1.4 What happens if parties file incorrect or incomplete documentation or fail to pay the correct fee?

1.5 Are there problems with statements of claim not containing sufficient information? (For instance, remedies sought, incorrect jurisdiction or inaccurate grounds of grievance?)

1.6 Are there cases where respondents do not complete an intention to defend form?

1.7 If the answer to the above question is yes, how do you remedy the situation?

1.8 Have you ever had to make a direction for a statement of defence to be filed?

1.9 Can you think of instances where either party to a personal grievance has called either insufficient or irrelevant witnesses?

1.10 Do you think the allowances and expenses payable to witnesses adequately reimburse expenses incurred?

1.11 Do you think the level of allowances/expenses is a deterrent for witnesses appearing at Tribunal hearings without being summonsed?

1.12 Do parties in adjudication hearings ever experience difficulty in presenting their evidence in Chief?

1.13 When presenting their evidence do they usually use written statements as guidelines?

1.14 Do self-representatives have any special difficulties in presenting evidence and examining witnesses?

1.15 If the answer to the above question is yes, how do you assist?

1.16 If previously unseen or heard of material is introduced by the Respondent, how do you allow the Applicant to respond? For instance, may they have a short adjournment to consider the matter?

1.17 If representatives are inadequate in their method of examining or cross-examining witnesses, how do you assist?

1.18 How do you deal with hostile parties to a grievance or hostile representatives?

1.19 Do you have a system for collecting accurate information from hostile witnesses?

1.20 If parties or witnesses are either hostile, or unduly upset, what approach do you use to calm them down?

1.21 If legal representatives bring cases under the wrong legislation, what is your approach?

1.22 In what circumstances would you vary the procedure for conducting hearings contained in the regulations?

1.23 Have you ever experienced an adverse reaction by parties or their representatives to any of your decisions?

1.24 How would you describe your caseload in comparison to that carried by other adjudicators? Fair? Heavy? Light?

1.25 What factors contribute to the time lapse between the occurrence of a grievance, its filing, and the date of hearing?

1.26 If mediation occurred, does it affect your decision-making process? If so, why?

1.27 What are the advantages and disadvantages to you of mediation having occurred?

1.28 What are the advantages and disadvantages to the applicant of mediation having occurred?

1.29 What are the advantages and disadvantages to the respondent of mediation having occurred?

1.30 What are the advantages and disadvantages to you of mediation having not occurred?

1.31 What are the advantages and disadvantages to the applicant of mediation having not occurred?

1.32 What are the advantages and disadvantages to the respondent of mediation having not occurred?

1.33 Where the remedies sought are unreasonable, how does it affect your approach?

1.34 If the remedies sought are not provided for in the legislation, how does it affect your attitude to the parties?

1.35 How do you make your decision about what remedies to award?

Reinstatement:

Reimbursement:

Compensation:

Recommendations:

1.36 What about remedies awarded in sexual harassment cases?

1.37 How do you take into account and measure contributory fault?

1.38 For compensation, what factors do you take into account when calculating the award (E.g., gender, ethnic origin, wage/salary)?

1.39 What is your attitude to the court's directions re remedies?

1.40 What factors affect your decision whether to use or not use s 34?

1.41 Have any of your decisions been appealed? If so, why do you think they were?

1.42 Were cases appealed on substantive issues or remedies awarded? (i.e. substantive remedies awarded or procedural issues).

1.43 What is your view of parties not complying with the legal requirements (E.g., wrong cause of action, failure to advise respondent that applicant legally aided, application not filed in time)?

2 TYPES OF ACTION

2.1 How do the types of grievance affect your hearing of the case? Dismissal (nature of dismissal e.g., theft or redundancy), unjustifiable action, discrimination, sexual harassment?

2.2 What about a sexual harassment claim? Do you take a more sensitive approach? In what way?

2.3 Do you make recommendations? If not, why not? What factors influence your decision to make or not make a recommendation?

2.4 What is your opinion on the overall standard of presentation of claims presented by:

Advocates

Union Advocates

Counsel

Self representatives?

2.5 Does the presentation standard affect your attitude to the claim or its defence?

3 PARTIES

3.1 Do you subscribe to the view that no power imbalance exists between employees and employers?

3.2 Do you ever perceive any power imbalances between the parties? How often?

3.3 What do you do to balance the power relationship?

3.4 In cases where there are multiple applicants, would it be more effective for a class action to have been brought?

3.5 Does the occupation of a person affect the questions you ask them?

3.6 Do you adjust your approach in relation to the questions you ask on the basis of the occupation of a party?

3.7 Does the occupation of an applicant affect your view of the seriousness of the action complained of?

3.8 Are there any general comments you could make about the types of responses you get from females and males?

3.9 Do you think you take a different approach depending upon the social status, gender, ethnicity or disability of the applicant?

3.10 Do you think you take a different approach depending upon the social status, gender, ethnicity or disability of the respondent?

3.11 If a particular employer or employee reappears frequently before the Tribunal, does this affect your objectivity in either the hearing process or in decision-making?

3.12 Do you think representatives treat witnesses in cross-examination differently depending on the gender, ethnicity, disability or social status of the witness?

3.13 Is gender, ethnicity, disability or social status a factor you take into account when determining credibility?

3.14 Have you had any training about cultural protocols, disability issues or gender issues?

4 REPRESENTATION

4.1 Do you perceive any varying levels of expertise of union advocates, advocates and counsel and self-representatives?

4.2 What are the differences?

4.3 Do you take a different approach to dealing with situations depending on whether the representative is an advocate, union advocate, lawyer or self-representative?

4.4 If the self-representative is either party, do you notice a difference in presentation styles and standards, depending on whether the self-representative is an applicant or respondent?

4.5 Do you tend to guide a self-represented party, or do you take a more relaxed approach to the legal requirements and process?

4.6 If a lawyer is incompetent, do you assist or guide them?

4.7 What about when a lawyer is inexperienced and not competent, would you guide them?

5 COSTS

5.1 Does the cost of representation restrict access to the personal grievance procedure? (For instance, solicitor's costs, advocate's fees, union fees etc?)

5.2 Do you think the cost of lodging and bringing a personal grievance is a barrier which prohibits people from having access to the Tribunal? (I.e., lodging fee and cost for work of representative).

5.3 When awarding costs, do you take into account:

How the case was conducted.

How the parties acted during the hearing.

Significance of the case to the parties.

Preparation time.

Time to prepare in a particular case in comparison to the time it would normally take to prepare a case.

Whether arguments lacking substance where brought.

If arguments which were unnecessarily legalistic and technical were brought.

Actual costs incurred.

5.4 What is your view of the principle that self-representatives cannot claim for the cost of their time?

5.5 Were there any cases where you considered awarding a self-representative costs for their time, as an exceptional case? Please give examples.

5.6 How do you determine whether or not expenses claimed are necessarily and reasonably incurred?

5.7 How do you determine whether or not to award costs for executive time?

5.8 How do you view the applicant's obligation to contribute to the respondent's costs in out of time applications?

5.9 If the late application was due to either illness of the applicant or action of the employer, how do you take this into account?

5.10 If a losing party brings a claim without merit, and despite clear warning has continued with the dispute, do you award costs against that party?

5.11 Have you had experience of having to adjudicate cases which were frivolous or trivial?

5.12 If the answer to the above question is yes, please give examples.

5.13 How do you determine whether or not a case is frivolous or trivial?

5.14 When required to reduce costs awarded due to legal aid being granted, what exceptional circumstances persuade you to set this rule aside and award costs?

5.15 Are there any general comments you wish to make?

APPENDIX IV

QUESTIONS FOR EMPLOYMENT TRIBUNAL ADJUDICATORS

1 PROCESS

1.1 How would you describe the process? Is it: formal? Informal? legalistic?

1.2 Have the intentions of the Employment Contracts Act been met, i.e. a "quick, informal, inexpensive process"?

1.3 Are you aware of instances where parties seeking adjudication file incorrect documents?

1.4 Are there problems with statements of claim not containing sufficient information? (For instance, remedies sought, incorrect jurisdiction or inaccurate grounds of grievance?)

1.5 Are there cases where respondents do not complete an intention to defend form?

1.6 If the answer to the above question is yes, how do you remedy the situation?

1.7 Have you ever had to make a direction for a statement of defence to be filed?

1.8 Can you think of instances where either party to a personal grievance has called either insufficient or irrelevant witnesses?

1.9 Do you think the allowances and expenses payable to witnesses adequately reimburse expenses incurred?

1.10 Do you think the level of allowances/expenses is a deterrent for witnesses appearing at Tribunal hearings without being summonsed?

1.11 Do parties in adjudication hearings ever experience difficulty in presenting their evidence in Chief?

1.12 When presenting their evidence do they usually use written statements as guidelines?

1.13 Do self-representatives have any special difficulties in presenting evidence and examining witnesses?

1.14 If the answer to the above question is yes, how do you assist?

1.15 If previously unseen or heard of material is introduced by the Respondent, how do you allow the Applicant to respond? For instance, may they have a short adjournment to consider the matter?

1.16 If representatives are inadequate in their method of examining or cross-examining witnesses, how do you assist?

1.17 How do you deal with hostile parties, witnesses or representatives to a grievance?

1.18 If legal representatives bring cases under the wrong legislation, what is your approach?

1.19 In what circumstances would you vary the procedure for conducting hearings contained in the regulations?

1.20 Have you ever experienced an adverse reaction by parties or their representatives to any of your decisions?

1.21 How would you describe your caseload in comparison to that carried by other adjudicators? Fair? Heavy? Light?

1.22 What factors contribute to the time lapse between the occurrence of a grievance, its filing, and the date of hearing?

1.23 If mediation occurred, does it affect your decision-making process? If so, why?

1.24 What are the advantages and disadvantages to the parties of mediation having occurred?

1.25 Where you think the remedies sought are unreasonable, how does it affect your approach?

1.26 If the remedies sought are not provided for in the legislation, how does it affect your attitude to the parties?

1.27 How do you make your decision about what remedies to award?

Reinstatement:

Reimbursement:

Compensation:

Recommendations:

1.28 What about remedies awarded in sexual harassment cases?

1.29 How do you take in to account and measure contributory fault?

1.30 For compensation, what factors do you take into account when calculating the award (E.g., gender, ethnic origin, wage/salary)?

1.31 What is your attitude to the court's directions re remedies?

1.32 What factors affect your decision whether to use or not use s 34?

1.33 Have any of your decisions been appealed? If so, why do you think they were?

[Were cases appealed on substantive issues or remedies awarded? I.e. substantive remedies awarded or procedural issues.]

1.34 What is your view of parties not complying with the legal requirements (E.g., wrong cause of action, failure to advise respondent that applicant legally aided, application not filed in time)?

2.0 TYPES OF ACTION

2.1 How do the types of grievance affect your hearing of the case? Dismissal (nature of dismissal e.g., theft or redundancy), unjustifiable action, discrimination, sexual harassment?

2.2 What about a sexual harassment claim? Do you take a more sensitive approach? In what way?

2.3 Do you make recommendations? If not, why not? What factors influence your decision to make or not make a recommendation?

3.0 PARTIES

3.1 Do you subscribe to the view that no power imbalance exists between employees and employers within the Employment Tribunal framework?

3.2 What do you do to correct any perceived power imbalance?

3.3 In cases where there are multiple applicants, would it be more effective for a class action to have been brought?

3.4 Do you adjust your approach in relation to the questions you ask on the basis of the occupation of a party?

3.5 Does the occupation of an applicant affect your view of the seriousness of the action complained of?

3.6 Are there any general comments you could make about the types of responses you get from females and males?

3.7 Do you have difficulty disregarding the social status, gender, ethnicity or disability of the applicant?

3.8 If a particular employer or employee reappears frequently before the Tribunal, does this affect your attitude in either the hearing process or in decision-making?

3.9 Do you think representatives treat witnesses in cross-examination differently depending on the gender, ethnicity, disability or social status of the witness?

3.10 Have you had any training in the area of cultural protocols, disability issues or gender issues?

4.0 REPRESENTATION

4.1 Do you perceive any varying levels of expertise of union advocates, advocates, counsel and self-representatives?

4.2 Is there a particular group of advocate who you see as not doing a good job?

4.3 Do you think anything can be done to raise or maintain the standards of representation?

4.4 Do you make allowances for poor presentation?

4.5 Do you take a different approach to dealing with situations depending on whether the representative is an advocate, union advocate, lawyer or self-representative?

4.6 If the self-representative is either party, do you notice a difference in presentation styles and standards, depending on whether the self-representative is an applicant or respondent?

4.7 Do you tend to guide a self-represented party, or do you take a more relaxed approach to the legal requirements and process?

4.8 If a lawyer is incompetent, do you assist or guide them?

4.9 What about when a lawyer is inexperienced and not competent, would you guide them?

4.10 Does the presentation standard affect your attitude to the claim or its defence?

5.0 COSTS

5.1 Does the cost of representation restrict access to the personal grievance procedure? (For instance, solicitor's costs, advocate's fees, union fees etc?)

5.3 Do you think the cost of lodging and bringing a personal grievance is a barrier which prohibits people from having access to the Tribunal? (I.e., lodging fee and cost for work of representative).

5.3 When awarding costs, do you take into account:

How the case was conducted?

How the parties acted during the hearing?

Significance of the case to the parties?

Preparation time?

Time to prepare in a particular case in comparison to the time it would normally take to prepare a case?

Whether arguments lacking substance where brought?

If arguments which were unnecessarily legalistic and technical were brought?

Actual costs incurred?

5.4 What is your view of the principle that self-representatives cannot claim for the cost of their time?

5.5 Were there any cases where it would have been just to award a self-representative costs for their time? Please give examples.

5.6 How do you determine whether or not expenses claimed are necessarily and reasonably incurred?

5.7 How do you determine whether or not to award costs for executive time?

5.8 How do you view the applicant's obligation to contribute to the respondent's costs in out of time applications?

5.9 If the late application was due to either illness of the applicant or action of the employer, how do you take this into account?

5.10 If a losing party brings a claim without merit, and despite clear warning has continued with the dispute, do you award costs against that party?

5.11 Do you penalise parties for presenting an inappropriate claim?

5.12 Have you had experience of having to adjudicate cases which were frivolous or trivial? Please give examples.

5.13 How do you determine whether or not a case is frivolous or trivial?

5.16 When required to reduce costs awarded due to legal aid being granted, what exceptional circumstances persuade you to set this rule aside and award costs?

5.15 Do you think the rule relating to exceptional circumstances in legal aid cases is too harsh?

5.16 If the answer to the above is yes, what would an appropriate alternative rule be?

5.17 Are there any general comments you wish to make regarding the Employment Tribunal and its procedure?

APPENDIX V

SURVEY QUESTIONS: EMPLOYEES

1. Were you a member of a union when your personal grievance occurred? Yes / No

2. If you were a union member, did the union represent you at your personal grievance hearing? Yes / No

3. If you were not a union member, how did you find a suitable representative?
_____

4. If you used a lawyer or advocate, did the cost of using a representative impact on your choice? Yes / No

5. If you did not use a lawyer, union or advocate, was cost one of the reasons, which influenced your decision to represent yourself? Yes / No

6. If you chose to represent yourself, what factors other than cost made you decide to choose this option? _____

7. Did you apply for legal aid? Yes / No

8. Was legal aid granted to you? Yes / No

9. If you were represented by a lawyer, union, or advocate, were you satisfied with the service they provided? Yes / No

10. If the answer to the above question is 'no', please advise why not?
_____

_____

11. Were you aware of the employee's pre-hearing obligations in personal grievance cases contained in the Employment Contracts Act? (E.g., the need to complete a statement of claim form?) Yes / No

12. Please indicate which term(s) describes the adjudication process most accurately. You may circle more than one option.

    a. Confusing

    b. Formal

    c. Informal

    d. Legalistic

    e. Intimidating

    f. Time-consuming

    g. Satisfactory

    h. Other (please state) _____

13. Did you attend mediation? Yes / No

14. If the answer to the above question is 'no', please indicate why you, or your employer did not attend mediation. _____

_____

15. If you attended mediation, why do you think this process did not resolve the grievance? _____

_____

16. Do you consider that the adjudication process was?

    (a) Quick? Yes / No

Please explain. _____

(b) Inexpensive? Yes / No

Please explain. _____

(c) Straight forward? Yes / No

Please explain. _____

17. In your opinion, did the adjudication process finally resolve the personal grievance? Yes / No

18. Do you think there is a more effective procedure to resolve personal grievances than adjudication? Yes / No

19. During the hearing, did you learn anything new about the employer's case which you had not previously been aware of? Yes / No

21. Did you return to your previous job after the adjudication decision was made? Yes / No

22. Do you think that you were compensated adequately for your personal grievance? Yes / No

APPENDIX VI

SURVEY QUESTIONS: EMPLOYERS

1. What was the date of the incident causing the personal grievance?
   _____

2. Were you aware of the employer's pre-hearing obligations in personal grievance cases contained in the Employment Contracts Act? (E.g. the need to complete intention to defend forms). Yes / No

3. Who represented you at the hearing?

   (a) A lawyer

   (b) An advocate

   (c) An in-house representative

   (d) Self-represented

4. Were you satisfied with the standard of representation you received? Yes / No

5. If you were not, please indicate why not?
   _____

6. If you represented yourself, how did you find out what your legal obligations were in relation to defending personal grievances? (E.g. which documents to file at the Employment Tribunal?)
   _____

7. Please indicate which term(s) describes your experience of the adjudication process most accurately. You may circle more than one option.

a. Confusing

b. Formal

c. Informal

d. Legalistic

e. Intimidating

f. Time-consuming

g. Satisfactory

h. Other (please state) _____

8. Did you attend mediation? Yes / No

9. If the answer to the above question is 'no', please indicate why you chose not to attend mediation. _____

_____

10. If you attended mediation, why do you think this process did not resolve the personal grievance?

_____

11. In your opinion, did the adjudication process finally resolve the personal grievance? (E.g. problems did not continue in the workplace after adjudication). Yes / No

12. Do you consider that the adjudication system was

(a) Quick? Yes / No

Please explain. _____

(b) Inexpensive? Yes / No

Please explain. _____

(c) Straight forward? Yes / No

Please explain. _____

Do you think there is a more effective procedure to resolve personal grievances than adjudication? Yes / No

APPENDIX VII

SURVEY QUESTIONS: SELF-REPRESENTATIVES

1. Which party were you at the adjudication hearing: applicant or respondent? _____

2. Did you believe there were grounds for the other party's case? Yes / No

3. Were you a member of a union at the time of the personal grievance? Yes / No

4. If the answer to the above question is 'yes', why did the union not represent you? _____

   _____

5. Was cost a factor in your decision to represent yourself? Yes / No

6. Please indicate which term(s) describes the adjudication process most accurately in the personal grievance case you were involved in. You may circle more than one option.

   a. Confusing
   b. Formal
   c. Informal
   d. Legalistic
   e. Intimidating
   f. Time-consuming
   g. Satisfactory
   h. Other (please state) _____

7. Do you have experience in the mediation process? Yes / No

8. Did you attend mediation ? Yes / No

9. If the answer to the above question is ‘no’, please indicate why you did not attend mediation. _____

_____

10. If you attended mediation, why do you think this process was unsuccessful?

_____

_____

11. In your opinion, did the adjudication process finally resolve the personal grievance? Yes / No

12. Do you consider that the adjudication process was:

(a) quick? Yes / No

Please explain. _____

(b) inexpensive? Yes / No

Please explain. _____

(c) straight forward? Yes / No

Please explain. _____

13. Did you experience any particular difficulties with the process? Yes / No

Please explain. _____

_____

14. If the adjudication system was not in your opinion an ideal method of resolving personal grievance cases, what would a suitable alternative be?

_____

APPENDIX VIII

SURVEY QUESTIONS: REPRESENTATIVES

1. Please indicate which role you performed in the personal grievance hearing: advocate, union advocate, or counsel? _____

2. Which party did you represent at adjudication: applicant or respondent? _____

3. Did you believe there were grounds for the employee's grievance? Yes / No

4. Was your client legally aided? Yes / No

5. How did you set your fees for representing your client? _____

   _____

6. Please indicate which term(s) describes the adjudication process most accurately in the personal grievance you advocated for in 1997. You may circle more than one option.

   i. Confusing
   j. Formal
   k. Informal
   l. Legalistic
   m. Intimidating
   n. Time-consuming
   o. Satisfactory
   p. Other (please state) _____

7. Do you have experience in the mediation process? Yes / No

8. Did you attend mediation? Yes / No

9 If the answer to the above question is ‘no’, please indicate why you did not attend mediation. _____

_____

10. If you attended mediation, why do you think this process was unsuccessful?

_____

_____

11 In your opinion, did the adjudication process finally resolve the personal grievance? Yes / No

12. Do you consider that the adjudication process was:

(a) quick? Yes / No

Please explain. _____

(b) inexpensive? Yes / No

Please explain. _____

(c) straight forward? Yes / No

Please explain. _____

13. If the adjudication system was not in your opinion an ideal method of resolving personal grievance cases, what would a suitable alternative be?

_____

_____

APPENDIX IX

ORIGINAL CLASSIFICATIONS

Initially the definitions of occupational class contained in the 1996 census were not considered in detail in this thesis as they classified the general working population as a whole. In contrast, the definitions specified in this research originally related only to the categories of occupational class of employees who had lodged personal grievances in 1997. This appendix presents an outline of this original classification and, where relevant, the original versions of the tables.

The original occupational classification tended to describe employees working in the State Sector as Public Service. It was later determined that this description was an imprecise way of categorising the nature of employment as Public Servant related to the place of employment rather than the nature of the occupation concerned. This inconsistency of description was not fully recognised until the same data was coded again using different criteria of the occupational classifications contained in the census. During this process, it became clear that it was the occupation itself which was relevant rather than the whereabouts of the employment. The description of employees of Public Servant was too general and covered a vast array of occupational classes. For example, a prison officer was a Public Servant but it was the nature of the work itself; guarding prisoners, which was relevant. Further distinctions such as these emphasise the differences between the original occupational classifications and those contained in the census.

On investigation, the classification of occupational classes contained in the census data and the classifications illustrated in this research have some significant deviations. For example, where originally Retail and Service Industry were classified separately, the classification in the census has merged these two classes into category five, which encompasses both Service and Sales.

Another area of distinction between the research for this thesis and the classifications contained in the census related to the classification of Managers. In this thesis, the classification of management related to the nature of the occupation itself, which included (if specified) the size and nature of the enterprise. In comparison, the census classification of managers was significantly broader and contained classifications such as service and sales type managers. Therefore a direct comparison between the classifications contained in the thesis and those in the census could not accurately be made. A particular area of difficulty related to the classification of managers in the retail industry. Since frequently the size of the enterprise was not specified, it was therefore difficult to determine whether the employee ought to be classified as a

corporate manager, retail worker, or how to decide which occupational class was the most accurate in describing the work of the employee.

In addition, the definition of clerical work contained in the original classification in this thesis had a broad definition[1]. It included occupations like receptionists, office managers, and general clerical assistants. In contrast, the definition of clerical specified in the census is comparatively restricted and much more specific. For example, it was limited to including such occupations as Library, Mail and Related Clerks. As a consequence of the classification distinction, the definition of clerical work has contracted and resulted in the range of occupations included in this classification being reduced. Consequently, there were more people categorised as clerical workers who took personal grievances than there would have been if the definition of clerical work contained in the census had been used.

The original General category in this thesis, which included unskilled work, labouring, and general work not requiring formal training represented the highest number of personal grievances. This category was significantly broader and larger than the elementary category of employees contained in the census.

Table I: Occupational Class of Applicants

Occupational Class[2]	**Auckland**	**Hamilton**	**Wellington**	**Christchurch**	**Dunedin**	**Total**
Clerical	27	1	10	4	2	44
Education	6	0	1	6	0	13
General	32	17	17	35	1	102

[1] See ch 5, n 19.

[2] In this research, Occupational classes have been divided as follows:
Clerical – office work, secretarial
Education – all types of teaching and tutoring
General – unskilled work, labouring, general work which did not require any formal training
Health Sector – nursing, medical health professionals
Management – managerial position
Management/General – employees carrying out management tasks but also involved with general work, for example those managing farms;
Professional – legal, accounting, work requiring a professional qualification
Public Sector – public service or state sector employees
Retail – those occupying retail positions
Service industry – hotel work, food, bars
Trade – all work requiring a trade qualification
Voluntary Sector – all those employed in the voluntary sector, for example the Foundation of the Blind.
It was decided to devise new categories of identifying occupational classes from those used by McAndrew, 'Determinations of the Employment Relations Authority' (2002) 27 (3) *New Zealand Journal of Industrial Relations* 323, 328. These were not specific enough to identify what class of employee took personal grievance claims and whether or not the type of occupation affected the outcome for employees.

Health Sector	4	1	0	5	1	11
Management	13	4	13	6	1	37
Management/General	4	0	0	1	2	7
Professional	12	1	0	4	1	18
Public Sector	3	1	8	2	0	14
Retail	17	3	12	15	1	48
Service Industry	26	3	6	15	1	51
Trade	15	3	2	9	0	29
Voluntary	4	0	1	0	0	5

Table I shows that in all jurisdictional areas (except for Dunedin) the 'General' occupational class, which included unskilled work, labouring, and general work not requiring formal training, represented the highest number of personal grievances. Statistics obtained from the 1996 Census show that numbers of those employed in the 'elementary occupations' class comprised 6.6 percent of the total number employed in all occupations across the Auckland, Hamilton, Wellington, Christchurch, and Dunedin regions.[3] This suggests that although employees from the 'elementary occupational' class did not comprise a significant proportion of all employees, they did appear more frequently in personal grievance claims. However, while the definition of 'elementary occupations' from the census information is similar to that of the 'general' occupational class contained in this analysis, they are not identical.[4] Similarly, in this analysis of the Employment Tribunal, all geographical areas in New Zealand were covered by a jurisdictional office of the Employment Tribunal,[5] whereas the regions displayed in the census information cover a particular geographical area.[6] Hence it was not possible to make a direct comparison between surveys of Employment Tribunal statistics and objective Census information, as the two geographical areas are different.

[3] See: http://www.stats.govt.nz/domino/external/web/ExtraPages.nsf/htmldocs/Standard+Regional+Tables+Census+1996+-+Map.

[4] 'Elementary Occupations' included; Labourers and related elementary service workers; Building caretakers and cleaners; Caretakers and cleaners; Cleaners; Building caretakers; Pest control workers; Messengers and doorkeepers; Couriers and deliverers; Hotel porters; Refuse collectors and related labourers; Refuse collectors; Street or park cleaners; Packers and freight handlers; Packers; Loaders and/or checkers; Railway shunters; Labourers; Surveyor's assistants; Builder's labourers; Sawmill labourers; and general labourers. See the schedule for the New Zealand Standard Classification for Occupations; http://www.stats.govt.nz/domino/external/web/carsweb.nsf/94772cd5918085044c2567e6007eec2c/ef7c87fcece9546ccc2568c40000836e/$FILE/ATTY5OX6/NZSCOall.txt. For a definition of the 'general' occupational class used in this research see above n 2.

[5] W R C Gardiner, *The Employment Tribunal (A Report from The Trenches)* 13 May 1998, 5.

[6] For an illustration of the geographical areas categorised in the 1996 census see: http://www.stats.govt.nz/domino/external/web/ExtraPages.nsf/htmldocs/Standard+Regional+Tables+Census+1996+-+Map.

Unsurprisingly, Auckland, having the largest population and the largest working population had the greatest number of applicants in many occupational classes. Table IX.1 also shows that Wellington had a proportionally higher number of public sector applicants. Census information from 1996 showed that Auckland had the highest number of legislators, administrators and managers, with 68,481, while Wellington had less with 27,111. However, in this analysis the category of 'public sector' has been restricted to those employed in public service departments, crown entities and state agencies. Therefore, this may explain why, in this analysis, there were more applicants from the public sector in Wellington although it remains unclear as to why there were the same number of applicants from management occupations in both Wellington and Auckland.

Table II: Gender of Applicant and Occupational Class

Occupational Class	**Female**	**Male**	**Both**	**Total**
Clerical	37	8	-	45
Education	4	9	-	13
General	17	82	4	103
Health Sector	6	5	-	11
Management	6	30	1	37
Management/General	0	5	-	5
Professional	5	13	-	18
Public Sector	7	7	-	14
Retail	14	32	-	46
Retail/General/Trade	-	-	2	2
Service Industry	19	28	4	51
Trade	3	26	-	29
Voluntary Sector	4	1	-	5

Table III: Types of Grievance per Occupational Class

Occupational Class	**Unjustifiable Dismissal**	**Constructive Dismissal**	**Unjustifiable Action**	**Other**	**Total**
Clerical	34	6	2	3	45
Education	10	1	1	0	12
General	83	9	5	6	103
Health Sector	8	0	2	1	11
Management	29	2	2	4	37

Management/General	6	0	0	1	7
Professional	15	0	1	3	19
Public Sector	6	4	3	1	14
Retail	34	2	0	5	41
Service Industry	38	3	5	5	51
Trade	21	4	0	4	29
Voluntary Sector	3	1	0	1	5

Table IV: Average Compensation by Occupational Class

Occupational Class	**Compensation Sought**	**Compensation Granted**
Clerical	$16,360	$3,395
Education	$35,000	$1,070
General	$17,310	$2,598
Health Sector	$42,500	$1,583
Management	$30,104	$4,571
Management / General	$19,000	$5,200
Professional	$42,000	$6,486
Public Sector	$22,000	$944
Retail	$25,018	$3,678
Service Industry	$16,500	$3,277
Trade	$17,775	$3,320
Average Total	$21,892	$3,339

Table V: Occupational Class of Applicant and Average Costs Sought and Granted

Occupational Class	**Average Costs Sought**	**Average Costs Granted**	**No. of cases**
Clerical	$2,671	$954	10
Education	$2,887	$1,375	2
General	$2,669	$1,160	21
Health Sector	$31,808	$11,000	1
Management	$6,248	$2,432	8
Management/General	$8,736	$2,250	2

Professional	NIA[7]	$1,500	1
Public Sector	NIA	NIA	0
Retail	$3,056	$1,130	12
Retail/General/Trade	NIA	NIA	1
Service Industry	$3,597	$1,689	12
Trade	$1,910	$1,155	9
Voluntary Sector	$5,550	$2,800	1

It appears from Table V that average costs sought and granted in the health sector were substantially higher than other occupational classes. However, this was as a result of one large claim and award of costs that skewed the figures for the health sector.[8]

Table VI: Average Length of Hearing (Days) and Occupational Class

Occupational Class	**Average Length of Hearing (days)**
Clerical	1.39
Education	1.82
General	1.55
Health Sector	2.43
Management	1.95
Management/General	1.86
Professional	1.82
Public Sector	2.64
Retail	1.39
Retail/General/Trade	1.00
Service Industry	1.32
Trade	1.38
Voluntary Sector	2.50

Table VI shows that personal grievances brought by public sector employees took the longest lasting an average of 2.64 days. Hearings for those employed in the voluntary sector and health sector also took longer, with average hearing times of 2.50 and 2.43 days respectively. One reason for the extended hearing times in these areas of

[7] NIA = No Information Available.
[8] See above Table IV. The case in question was HT 05/97.

personal grievances may have been the complexities of the cases. For example, a public sector personal grievance may have had extraneous circumstances to consider under the *State Sector Act 1988* in addition to obligations under the *Employment Contracts Act 1991*.

Table VII: Occupational Class and Applicant Success

	Wholly Successful	Partially Successful	Unsuccessful	Total
Clerical	11.11%	53.33%	35.56%	45
Education	0.00%	38.46%	61.54%	13
General	3.88%	50.49%	45.63%	103
Health	9.09%	27.27%	63.64%	11
Management	10.81%	54.05%	32.43%	37
Management / General	14.29%	85.71%	0.00%	7
Professional	5.56%	44.44%	50.00%	18
Public	0.00%	14.29%	85.71%	14
Retail	10.87%	54.35%	34.78%	46
Service	1.96%	66.67%	31.37%	51
Trade	3.45%	51.72%	44.83%	29
Voluntary	20.00%	40.00%	40.00%	5

‘Confusing’

To test the premise that users found the procedure confusing, it was decided to analyse Tables 5.1 and 5.7 from Chapter Five, to see whether the respective groups had, or lacked, certain skill sets that would have enabled them to participate in the process without finding it confusing.

A breakdown of the applicants figures contained in Table 5.7, Chapter Five, showed a high percentage of those classes which were least likely to possess skills which they could bring to bear during adjudication. Those classes considered less likely to possess the requisite skills included: general (27 percent); retail (12.6 percent); service industry employees (13.4 percent); trades (7.6 percent); and the voluntary sector at (1.4 percent).

The total of these classes accounted for 62 percent of all applicants in the adjudication procedure for the 1997 year. The remainder is accounted for by members of the education, health, and public sectors, along with those who were in clerical, managerial and professional classes. Those considered most likely to have the least difficulty with the adjudication process, the professional class, made up only 4.7 percent of the total number of applicants.

For an analysis of respondent employers, the figures needed were readily available. Respondents were classified as belonging to the Government, company, or 'other' categories when, due to their structure, they could not be classified by gender. The 'other' category related to entities such as incorporated societies, trusts, and polytechnics. It can be seen in Table 5.1, 89 percent of the total respondent figure had some type of organisational structure from which to draw. However, this might have varied from the high degree of organisation and diverse skill base available to public servants, to a minimally capitalised limited liability company made up of a majority shareholding managing director and a minority shareholding domestic partner, where the requisite skills might be less likely to exist. Although it is acknowledged that a wide range of skills was likely to have existed in both applicant and respondent groups, it would seem that respondents generally were more likely to have had access to a wider range of support networks from which relevant skills were available, such as the Employers Chamber of Commerce and professional organisations. This may provide one explanation for respondents finding the adjudication process less confusing than applicants. However, it is important to keep in perspective that the total number of either party who found the adjudication process confusing was small.

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